

given the vote. In the case of membership similar disqualifications were provided to those for the franchise, but in addition a member must be twenty-five years of age, and must not be an undischarged insolvent or a legal practitioner under discharge or suspension, and conviction of crime or of illegal corrupt practices in connexion with an election was in certain conditions a bar.

The duration of the councils was fixed at three years, subject to the power of the governor to dissolve at any time and to extend it for one year in special circumstances.¹ After dissolution a new council must be summoned within six, or with the secretary of state's permission nine, months. The governor was authorized to summon and prorogue the council, while the presiding officer might adjourn it. The presiding officer had only a casting vote. As a sign of the new régime the governor ceased to preside, and for the first four years a president appointed by the governor presided; thereafter the president was elected by the council, which could remove him, in both cases subject to the governor's concurrence.²

The powers³ of the councils extended to legislation for the peace and good government of the territories in the province, including the right to repeal or alter any law made for the province before or after the Act of 1919 by any authority in British India. But this power was subject to the rule that the previous sanction of the governor-general was required before the legislature made or took into consideration any law (a) imposing new taxation unless the taxation fell within specified heads; (b) affecting the public debt or customs duties or any other tax or duty imposed by the central legislature; (c) affecting military, naval, or air forces; (d) affecting the relations of the government with foreign princes or states; (e) regulating any central subject or any provincial subject declared to be subject to central legislation. Such sanction was also necessary before affecting any power vested in the governor-general in council by any law or altering any law made before the commencement of the Act which was declared by rules to be unalterable without prior sanction or any later central

¹ S. 8. Power was extended by 23 & 24 Geo. V, c. 23, to allow of constitutional changes.

² S. 9. This sanction was given in the case of Burma in 1935.

³ S. 10

legislation forbidding alteration. But the fact that assent was given to a Bill passed without due sanction was to render the omission of no effect. Finally, the council could not make any law affecting any Act of Parliament.

The limitations imposed by earlier legislation on the functions of the councils were swept away, but special rules were laid down for finance.¹ Each year a statement of estimated revenue and expenditure was to be submitted to the council, and the government's proposed expenditure was to be submitted in the form of demands for grants. The council might assent, refuse assent, or reduce the amount asked for either by reducing the total of the grant or by omitting or reducing any of the items. No appropriation could be proposed save on the recommendation of the governor, thus maintaining the principle which forbids members of the legislature to suggest expenditure, since they have no responsibility for the budget. There have been noted above the powers of the government to disregard the refusal of the council to vote items. There were exempted from consideration by the council: (1) contributions payable to the central government; (2) interest and sinking fund on loans; (3) expenditure the amount of which was prescribed by law; (4) salaries and pensions of persons appointed by or with the approval of the Crown or by the secretary of state in council; and (5) salaries of judges of the high court and the advocate-general. The governor was given the power to decide whether any expenditure fell within these categories.

A general power was given to the governor to prevent further proceedings on any Bill, clause, or amendment if he deemed that the safety or tranquillity of the province or any part thereof or of another province was affected. Moreover, rules could be made to regulate the proceedings of the council, and where rules made no provision standing orders might be made with the assent of the governor. In any case there was to be freedom of speech subject to the rules and the standing orders, and no person should be liable to proceedings in any court for any speech or vote in the council.

The governor was given power to assent to a Bill, refuse assent or return for reconsideration with any suggested

¹ S. 11.

amendments or to reserve.¹ He was required² to reserve Bills containing provisions not previously sanctioned by the governor-general affecting religion, Universities, making a reserved matter transferred, providing for the construction of light railways or tramways, or affecting land revenue, and might reserve matters affecting any matter with which he was specially charged by his instrument of instructions, or central matters, or the interests of another province. A reserved Bill might with the governor-general's assent be returned to the council for consideration within six months and again presented with or without change to the governor. Or the governor-general might assent within six months; failing such action or the return of the Bill, it was deemed to be dropped. An Act assented to by the governor required the assent of the governor-general to be valid; that assent might be withheld or the Act be reserved by the governor-general when it would take effect only if approved by the Crown in council.³ Any Act might be disallowed by the same authority.

The provisions of the Act were rendered effective by a mass of regulations made under the Act⁴ by the Indian government with the sanction of the secretary of state in council and the approval of both Houses of Parliament. The transferred subjects⁵ were declared to be local self-government; medical administration; public health and sanitation and vital statistics; pilgrimages within British India; education other than European and Anglo-Indian education and certain specified institutions, including the Benares Hindu University, the Aligarh Muslim University, chiefs' colleges and institutions for the education of children of governmental servants; public works; agriculture; civil veterinary department; fisheries; co-operative societies; forests in Bombay and Burma; excise; registration of deeds and documents; registration of births, deaths, and marriages; religious and charitable endowments, development of industries, including industrial research and technical education; stores and stationery required for transferred departments; adulteration of foodstuffs and other articles; weights and

¹ S. 12.

² Notification No. 313-S., December 16th 1920. In Coorg all Bills must be reserved (January 28th 1924).

³ S. 43.

⁴ S. 2.

⁵ Notification No. 308-S., December 16th 1920.

measures; libraries, museums, and zoological gardens; and in Burma¹ regulation of betting and gambling; prevention of cruelty to animals and the protection of animals and birds; control of dramatic performance and cinematographs, subject to Indian legislation as to exhibition of films; and pounds and the prevention of cattle trespass. There were various limitations even of these powers, but their importance was minimized by the fundamental rule² that no Act of a province or of the Indian legislature was to be deemed invalid because it went beyond the sphere of such legislation, and in the same way no governor's Act on a reserved matter was to be deemed invalid because it touched on a transferred matter. This was natural, since the governor-general was made an integral part of the authority of legislation.

The choice of topics was dictated by the consideration of the matters which most easily could be entrusted to ministers and which offered them the greatest scope for social and economic development, the nation-building activities, and the sphere of social reform, the latter a sphere in which British officials could not safely operate. Hence the power of superintendence, direction, and control of the governor-general in council was in respect to transferred subjects to be exercised only (1) to safeguard the administration of central subjects; (2) to decide disputes between two provinces; (3) to safeguard his position in respect of duties regarding the High Commissionership for India, the raising of provincial loans, the civil service, and any rules made with the authority of or by the secretary of state in council.³ In the same spirit the intervention of the secretary of state in council was limited to the same heads, with the addition of the safeguarding of imperial interests, and the determination of the position of the Government of India in matters arising between India and other parts of the British Empire.⁴

To the official side of the government of the provinces were ascribed matters frequently if inaccurately described as law and order, and a wide control of finance. Thus the reserved subjects included water-supplies, irrigation, and canals; land

¹ Notification No. 519-V, February 2nd 1923.

³ Devolution Rules, December 16th 1920, s. 49.

⁴ Notification No. 835-G, December 14th 1920.

² Act, s. 16 (2).

revenue administration; famine relief; land acquisition; administration of justice, including courts, civil and criminal, subject to Indian legislation as to high courts and criminal courts; law reports; the administrator-general and official trustees; non-judicial stamps subject to Indian legislation and judicial stamps subject to such legislation as regards fees in the original jurisdiction of high courts; development of mineral resources; factories, settlement of labour disputes, electricity, boilers, gas, smoke nuisance, and welfare of labour, including provident funds, industrial insurance, and housing subject in most cases to Indian legislation; ports other than major ports; inland navigation subject to Indian legislation; police, betting and gambling, prevention of cruelty to animals, protection of wild birds and animals, control of poisons subject to Indian legislation; control of motor-vehicles on the same condition, and control of cinematographs subject to Indian legislation as to sanction of films; control of newspapers, books, and printing presses, subject to Indian legislation; coroners; excluded areas; criminal tribes; and European vagrancy subject to Indian legislation; prisons and reformatories subject to Indian legislation; pounds and prevention of cattle trespass; treasure-trove; provincial government presses; elections for Indian and provincial legislatures; regulation of professions, subject to Indian legislation; local audit fund; control of government services; sources of revenue not included under other heads; borrowing of money; any matter declared by the governor-general in council to be of a merely local or private nature, e.g. gazetteers, statistics, and ancient manuscripts; and any matters relating to central subjects on which powers were given to local governments by law.

Doubts as to the classification of any subject as provincial were solved by the governor-general in council, as to that of any subject as reserved or transferred by the governor, who when any matter affected both sides of his government was instructed to have it considered jointly, but must finally decide in which department action was to be taken. Officers dealing with transferred subjects were controlled by the governor with a minister, but were safeguarded by requiring the personal concurrence of the governor in matters affecting emoluments

or pensions, formal censure or unfavourable replies to memorials, and his assent was necessary also for the posting of All-India service officers. Further, each government was required to employ on such conditions as the secretary of state in council thought fit officers of the Indian Medical Service, a rule inserted to secure due facilities for medical attention to officials in the service.

Elaborate arrangements were provided as to finance.¹ The provinces were granted as sources of revenue (1) balances to their credit at the time of the Act taking effect; (2) receipts from provincial subjects; (3) a share in the growth of revenue from income tax collected in the province so far as the increase was due to an increase in the amount of income assessed; (4) recoveries of loans and advances made by the local government and of interest thereon; (5) payments made by the Indian government or any province for services rendered or otherwise; (6) proceeds of taxes imposed by the province; (7) proceeds of loans; and (8) any other sources assigned by the Indian government. The Berar revenues were given to the Central Provinces, but conditionally on proper sums being expended for its due administration. All government revenue was to be paid into the public account, of which the governor-general in council was custodian, and the latter was authorized to make rules regarding the mode of dealing with the account. Provision was made for annual contributions from the provinces to the centre, but these it became possible to remit in 1927-8. The central government was also authorized to limit the extent to which any province might draw on its balances, but in that case interest had to be paid. Provision was made for the rate of interest on sums due to the centre on provincial loan account of April 1st 1921, and for the liquidation of the sum due in twelve years. Capital expenditure by the centre on irrigation and other works handed over to a province was to be treated as an advance on which interest was to be paid, and the centre might lend sums on agreed terms as to interest and repayment fixed by the centre.

Local governments were also required to make annual payments at specified rates to a famine insurance fund, which

¹ P. Banerjee, *Provincial Finance* (1929).

could be used only for direct relief or construction of protective irrigation or other works for famine relief or on loans to cultivators. Interest was made payable by the centre on the sums to the credit of the province each year, and assignments could be suspended when a sum equal to six times the annual assignment had been accumulated.

Proposals for taxation or borrowing must be considered by the whole government, but the decision must be arrived at by the side of the government which initiated the proposal. For expenditure in the event of dispute the governor could decide by allocating proportions of the revenue and balances; failing agreement or allocation the proportions of the preceding year were made applicable; in fact, agreement was preferred. The local government was authorized to sanction expenditure on transferred subjects up to the amount voted by the legislature, and in the case of non-votable items subject to any consent required from the centre or the Home Government. Control, however, was exercised by the Home Government in the form of forbidding the local government to include certain matters in any demand for grants without the sanction of that government. The items in question were matters affecting any permanent post usually held by members of the All-India service; the creation of a permanent post on pay exceeding 1,200 rupees a month or the extension beyond two years of such a temporary post or the creation of a temporary post with pay exceeding 4,000 rupees a month; the grant of extraordinary pensions or gratuities except in certain specified minor cases; and expenditure irregularly incurred on imported stationery. Request in these matters must be sent through the centre for the sanction of the Home Government.

To secure the effective working of the financial system the creation of a finance department under a member of the executive council was required in every province. Its head was a financial secretary to whom if ministers desired could be added a joint secretary specially concerned with the finance of transferred subjects and proposals for borrowing or taxation made by ministers. It was made responsible for the local loans account, the famine insurance fund, the examination of all proposals for the increase or reduction of taxation, the

examination of proposals for borrowing and the raising of loans sanctioned, the laying down of rules for keeping of accounts, and the preparation of the budget and supplementary estimates. It was required to receive reports from the audit officers of unauthorized expenditure, and to require the department concerned either to obtain sanction or to cease, and it prepared and laid before the committee of the legislature on public accounts, which was annually appointed, the audit and appropriation accounts, calling special attention to unauthorized expenditure. The committee normally was constituted to the extent of two-thirds of members chosen by the unofficial members of the council, and its procedure was based on that of the corresponding committee of the British House of Commons.¹ The power of approving transfers within a grant between major, minor, and subordinate heads was given to the department, ministers and members of council being restricted to transfers between subordinate heads. It must be consulted on all proposals affecting establishment charges, on all grants and concessions of land, water-power, mineral, and forest rights; on abandonment of revenue budgeted for and on proposed increases of expenditure. When consulted it was empowered to require that its report should be laid before the governor for the order of the local government, and the governor might direct the laying of the report before the public accounts committee.

As regards borrowing for permanent works, for irrigation, for famine relief, for the provincial loan account and repayment or consolidation of loans the assent of the Indian government was requisite for any loan to be raised in India, that of the Home Government for any loan to be raised outside India, the Indian government being consulted in that case.

As regards expenditure on reserved matters the sanction of the Home Government was required in those cases where it was requisite in respect of transferred subjects, and in addition it was requisite for capital expenditure on various classes of public works where the interests of more than one local government were concerned, where the original estimate

¹ Finance Committees to advise the Finance Department on issues referred were set up at the centre, Bombay, Madras, United Provinces, Punjab, and Burma, and later in Assam; Cmd. 3668, pp. 370, 371.

exceeded fifty lakhs of rupees, where a revised estimate exceeded by more than 15 per cent an approved estimate, where a further revised estimate was proposed; for changes of establishment costing more than five lakhs, or if the legislature had recommended the charges exceeding fifteen lakhs; and for certain expenditure on the governor, his residence, and transport for his or other high officials' use.

The powers of the legislatures to impose fresh taxes¹ were restricted by rules to the case of taxation of betting or gambling; of advertisements; of amusements; on specified luxuries; registration fees and stamp duties other than those of which the amount was fixed by Indian legislation. They could also authorize without previous sanction of the governor-general taxation for local purposes in the form of tolls, taxes on land or land values; buildings, vehicles or boats, animals, menials and domestic servants, octrois, terminal taxes on import or export, taxes on trades, professions and callings, on private markets and in respect of services rendered such as water, lighting, sanitary, drainage and market rates. In other cases prior sanction was necessary and the free activity of the legislatures in general legislation was distinctly reduced by the length of the list of Acts which they might not affect without such sanction, for the rules included in this list most of the important legislation of the Indian legislature.

In finance, therefore, and in legislation the freedom left to the provincial legislatures was very narrowly limited, for the control of the governor-general in council precluded much freedom on the part of the governor, who was thus compelled as well as authorized closely to control the actions of his ministers. Nevertheless it was intended that ministerial control should be preserved whenever possible. While it was recognized that provision must be made for the case where a ministry was vacant for any cause, it was provided that the portfolio should if possible be given temporarily to another minister, and if the governor had to act himself he must report to the governor-general in council that an emergency had arisen, compelling such action, and it was expected that a minister should be appointed so soon as possible.

¹ Notification No. 311-S, December 16th 1920.

In addition to provincial functions proper it was provided that the governor in council might be employed by the Indian government in the performance of central functions, the cost of such action to be defrayed from central funds. Where a department served both central and provincial purposes, and there was divergence of view as to the proportion of cost to be borne by each, the secretary of state in council was given the decision.

(b) THE GOVERNMENT OF INDIA

The joint committee went farther than the report in reconstructing the Indian legislature. The report had contemplated that the second chamber, the Council of State, should be mainly nominee, only 21 out of 250 members being elected, chiefly by the non-official members of the provincial legislatures. It would have occupied a minor position in ordinary legislation, measures passed in the assembly being put before it, a joint session following if the council desired amendments which the Assembly did not wish to accept. The joint committee preferred that the Council should be placed on the footing of an ordinary second chamber, and rejected the idea that it should be elected in part by the provincial legislatures, a decision which was to affect in an important degree the constitution of 1935. Hence the Council was composed¹ of 19 official and 6 unofficial nominated members and 34 elected members, general 20, Muslim 10, Sikh 1, and European 3. The franchise was fixed at a high property qualification. The president was appointed by the governor-general, and nominated as a member of council, an experienced British parliamentarian being selected. The Legislative Assembly was composed of members of whom not less than five-sevenths were elected, while of the rest one-third must be non-officials. The first president was chosen for four years by the governor-general, the office thereafter being filled by election with his approval. There were in the first Assembly² 143 members, officials 25, non-officials nominated 15, and elected 103.³ Of the latter 51 were returned for general

¹ Act of 1919, s. 18, and rules.

² S. 19 and rules.

³ In 1934 the figures were 26, 13, and 106; Cmd. 4939.

constituencies, 80 for Muslim constituencies, 2 represented Sikhs, 7 landowners, 9 Europeans, and 4 represented Indian commerce. In the case of the Assembly as of the Council a high franchise was required, though of much more generous type, women being admitted. In 1934 the electorate was 1,415,892, but only 81,602 women.

The duration of the Council was fixed at five, of the Assembly at three years.¹ The governor-general was empowered to dissolve either house separately, and to extend their existence if necessary; thus the Assembly of 1930 was continued to 1934. After dissolution a new chamber must be summoned within six, or, with the secretary of state's approval, nine, months. The governor-general was authorized to summon and prorogue, and the presiding officer to adjourn the chamber; to him was accorded only a casting vote.

As in the case of the provincial councils, no official was permitted to stand for election to the legislature,² and any non-official ceased to be a member on appointment to office. An elected member of either chamber ceased to be so on election to the other chamber, and if any person were elected to both, he was required to signify in writing his choice, whereupon his seat in the other chamber became vacant. Every member of the executive council must be nominated to one chamber or other, but had, further, the privilege of attending in and addressing the other chamber, but not of voting therein.

There were similar provisions regarding the making of rules of procedure and of standing orders. The existence of two houses necessitated deadlock provisions, but all that was laid down was that, if either chamber did not within six months accept, with or without agreed amendments, a Bill from the other, the governor-general might at his discretion summon a joint session.³

In finance⁴ it was required that the estimated annual revenue and expenditure should be laid before the legislature; all initiative of appropriation was reserved to the governor-general, but certain matters were not merely excluded from the vote of the assembly but also from discussion without his

¹ S. 21.

² S. 22.

³ S. 24.

⁴ S. 25.

sanction: (1) interest and sinking-fund charges on loans; (2) expenditure the amount of which was prescribed by law; (3) salaries and pensions of persons appointed by the King or the secretary of state in council;¹ (4) salaries of chief commissioners and judicial commissioners; and (5) expenditure classified by the governor-general in council as ecclesiastical, political, and defence. The governor-general was given final power to decide whether any expenditure fell within the categories mentioned.

The governor-general in council's demands might be accepted, refused, or diminished by the Assembly, but he might declare that any demand was essential to the discharge of his responsibilities and act as if assent had been given, and he could further authorize any expenditure necessary in his view for the safety or tranquillity of British India or any part thereof.

In the case of failure by the chambers to pass legislation in the form recommended by the governor-general he might certify that the passage of the Bill was essential for the safety, tranquillity, or interests of British India or some part thereof, in which case the Bill would become law forthwith if already accepted by one house, or on being accepted by the house which had not yet considered it; failing this it would become law on his signature. Such an Act had to be laid before both Houses of Parliament before it could be assented to by the Crown and become operative, but it could be given immediate effect by the governor-general if a state of emergency existed.²

To the restrictions already existing on the action of the legislature were added the requirement of prior sanction of the governor-general to the introduction of any Bill dealing with provincial subjects which were not made subject to Indian legislation; repealing or amending any provincial Act; or repealing or amending any Act or ordinance of the governor-general. The governor-general was also given power to prevent proceedings on any Bill or amendment by certifying that it affected the safety or tranquillity of British India or any part thereof.³

¹ This provision was expanded by 15 & 16 Geo. V, c. 83, to cover payments made by order of the Government on appeal.

² S. 26.

³ S. 27.

The powers of the legislature were thus largely expanded through the representative character of the Assembly, and it was made a more effective means of criticizing and holding the government within lines of action approved by Indian feeling. The executive, however, remained wholly free from direct authority of the legislature, and the changes¹ made in it were simply intended to strengthen it in order to secure greater efficiency, all the more necessary with a legislature so strengthened. The limit of numbers was removed, and the qualification of the legal member enlarged by permitting the appointment of a pleader of the high court for ten years, the original five years being similarly extended for barristers and advocates. Power² was also given to the governor-general to appoint council secretaries who might assist the executive councillors in the legislature, the idea being that thus closer contact might be established between the legislature and the executive. It was understood, though not provided by law, that half of the executive council would normally be Indian.

The subjects which were confided to the central legislative and executive control were as follows:

'Defence of India and all matters connected with His Majesty's Naval, Military and Air Forces in India, or with His Majesty's Indian Marine Service, or with any other force raised in India, other than military and armed police wholly maintained by local Governments; naval and military works and cantonments; external relations, including naturalization and aliens, and pilgrimages beyond India; relations with States in India; political charges; communications to the extent described under the following heads, namely—(a) railways and extra municipal tramways, in so far as they are not classified as provincial subjects; (b) aircraft and all matters connected therewith; and (c) inland waterways, to an extent to be declared by rules made by the Governor-General in Council or by or under legislation by the Indian legislature; Shipping and navigation, including shipping and navigation on inland waterways, in so far as declared to be a central subject; light-houses (including their

¹ S. 28.

² S. 29.

approaches), beacons, lightships and buoys; port quarantine and marine hospitals; ports declared to be major ports by rule made by the Governor-General in Council or by or under legislation by the Indian legislature; posts, telegraphs and telephones, including wireless installations; customs, cotton, excise duties, income-tax, salt and other sources of All-India revenues; currency and coinage; public debt of India; savings Banks; the Indian Audit Department and excluded Audit Departments, as defined in rules framed under section 96D (1) of the Act; civil law, including laws regarding status, property, civil rights and liabilities, and civil procedure; commerce, including banking and insurance; trading companies and other associations; control of production, supply and distribution of any articles in respect of which control by a central authority is declared by rule made by the Governor-General in Council or by or under legislation by the Indian legislature to be essential in the public interest; development of industries, in cases where such development by a central authority is declared by order of the Governor-General in Council, made after consultation with the local Government or local Governments concerned, expedient in the public interest; control of cultivation and manufacture of opium, and sale of opium for export; stores and stationery, both imported and indigenous, required for Imperial Departments; control of petroleum and explosives; geological survey; control of mineral development, in so far as such control is reserved to the Governor-General in Council under rules made or sanctioned by the Secretary of State, and regulation of mines; botanical survey; inventions and designs; copyright; emigration from, and immigration into, British India, and inter-provincial migration; criminal law, including criminal procedure; central police organization; control of arms and ammunition; central agencies and institutions for research (including observatories) and for professional or technical training or promotion of special studies; ecclesiastical administration including European cemeteries; survey of India; archaeology; zoological survey; meteorology; census and statistics; all-India services; legislation in regard to any provincial subject, in so far as such subject is stated to be

subject to legislation by the Indian legislature, and any powers relating to such subject reserved by legislation to the Governor-General in Council; territorial changes, other than inter-provincial, and declaration of law in connexion therewith; regulation of ceremonial titles, orders, precedence and civil uniform; immovable property acquired by, and maintained at the cost of, the Governor-General in Council; the Public Service Commission; all matters expressly excepted from inclusion among provincial subjects; all other matters not included among provincial subjects.'

(c) MINOR PROVINCES AND BACKWARD TRACTS

The proposals of the Report left for the direct control of the government of India the frontier provinces, the North-West Frontier Province and Baluchistan, and the smaller tracts of India such as Delhi, Coorg, and Ajmer-Merwara, while Burma was left out of account on the score that the people were in another stage of political development and problems were different. It was suggested that in these areas advisory councils might be associated with the personal administration of the chief commissioner. In addition attention was called to the fact that even in the eight provinces there were certain backward areas, generally the tracts mentioned in the schedules to the Scheduled Districts Act, 1874, which required specific treatment. The Act of 1919¹ therefore authorized the governor-general in council to declare any territory to be a backward tract, and with the sanction of the Home Government to direct that the Government of India Act should apply to the territory subject to such exceptions and modifications as he might prescribe. Thereafter, he might direct that any Act of the India legislature should not apply to the territory, or should apply only subject to such exceptions or modifications as he thought fit and might authorize the governor in council to give similar directions as regards any local Act. These areas, of course, remain subject to the existing powers of the making of regulations by the executive under the powers of the Government of India Act.² In accordance with these proposals certain areas,

¹ S. 15 (2).

² S. 71, derived from the Act of 1870.

including in Madras the Laccadive Islands and Minicoy, in Bengal the Chittagong hill tracts, in the Punjab Spiti, in Burma all the backward tracts¹ and, in Bihar and Orissa, Angul were excluded from the legislative power of the central and the provincial legislatures, though the governor in council might apply provincial Acts subject to modifications; proposals for expenditure need not be submitted to the legislature, nor questions asked, or matters affecting tracts discussed therein. In the case of other tracts legislative power was not excluded, but Acts made were only to come into force to the extent determined by the central or local government. Darjeeling and Lahaul were otherwise totally excluded. In the other areas, including those of Assam, Chota Nagpur, the Santal Parganas, and Sambalpur, ministers were given authority over transferred subjects, subject to the power of the governor to protect backward classes. Some attempts, not very successful, were made to represent the interests of these tracts in the legislatures.

Of the other territories not dealt with by the Act, Burma was soon brought into the provincial system on the wish of her government and legislature.² In her case the proportion of elected members was put at 60 per cent, and the maximum number of members at ninety-two. Coorg was offered inclusion in Madras; when this proved unacceptable, there was created under existing authority a legislative council with the former drastically restricted powers as under the Acts of 1892 and 1909, consisting of fifteen elected and five nominated members.³ The territory of Ajmer-Merwara, under a chief commissioner since 1871, Ajmer having from 1832 been associated with the North-Western Provinces, was held to be too small to allow of a legislature being created, and it remained accordingly subject to the central legislature, with power for the governor-general in council to make regulations under the Government of India Act, and to extend laws of other parts of India to it as a scheduled district under the Act of 1874 of the Indian legislature, which applies to every district placed under the system of regulations. The Andaman and Nicobar Islands were

¹ The governor assumed charge of the Shan states. In 1923 a Federated Council was formed.

² Notification 225, October 7th 1921, operative January 2nd 1923.

³ Notifications F. 248, 22 I, October 30th 1923.

in like case, while Delhi remained under the régime of Act XIII of 1912.

The North-West Frontier Province, after discussion at the Round Table Conference, was given the status of a governor's province in April 1932, with a governor, executive councillor, minister, and a legislature of forty members, twenty-eight elected. A subsidy of a crore of rupees yearly was provided for three years.

Aden became a chief commissionership from April 8th 1932, for civil government, but for military and political affairs there and for the protectorate the chief commissioner was made subject to the British Government;¹ he was aided especially for protectorate business by a political secretary; his judicial assistant was drawn from the Indian Civil Service.

(d) THE SECRETARY OF STATE IN COUNCIL

The home administration of Indian affairs was examined by a committee under Lord Crewe, whose recommendations were in part modified by the joint committee. The essential proposal of the former body was the vesting of control of Indian government in the secretary of state alone, thus depriving the council of any controlling power. He would have been able to obtain advice from an advisory council. The joint committee, recognizing that this meant a very important step in relaxation of control was unwilling to go so far, and merely agreed to modifications of detail.² Thus the personnel of the council was reduced from ten to fourteen to eight to twelve, one half to be qualified by ten years' residence or service in India, and not merely British India. The term of office was reduced to five years, and payment was provided at £1,200 a year plus £600 for persons of Indian domicile, in order to render it easier to secure well-qualified Indians willing to serve. Weekly meetings gave place to monthly meetings and a wide discretion was given to the secretary of state in council to prescribe matters affecting the form of communications to India and from India. But no concession was made, directly at least, to the secretary of

¹ See 20 & 21 Geo. V, c. 2; Order in Council, August 15th 1929.

² Ss. 31, 32, 34. For the writer's views as member of the Crewe Committee see Cmd. 207, pp. 36-60.

state of power to withhold matters at his discretion from his council, as had been proposed in a Bill which Lord Crewe¹ had endeavoured to secure in 1914 but to which the House of Lords was clearly opposed. Nonetheless the position of the council was recognized as clearly subordinate to the secretary of state, with an exception to be noted below.

A change of great constitutional importance was made by providing that the salary of the secretary of state must be and that of his staff might be met from funds voted by Parliament. The principle by which India paid for the India Office was a relic of the days of the Company which had remained operative to save expense to the British treasury; it was disapproved by Lord Crewe's committee and the joint committee heartily concurred.

The secretary of state in council was authorized to restrict by rules² the power of superintendence, direction, and control vested in him, and such rules, if dealing with transferred subjects had immediate effect, but must be laid before both Houses of Parliament and rescinded if an address was passed by either House asking for annulment. Other rules were not to be effective until expressly approved after being laid in draft before the Houses. The Crewe committee urged that in any matter legislative or administrative the concurrence of the legislative assembly as regards non-official members and the government of India should carry with it approval of the Home Government unless the secretary of state felt that his responsibility to Parliament for the peace, order, and good government of India or paramount considerations of imperial policy required him to seek reconsideration of the issue by the Assembly. The joint committee favoured the growth of a convention that the secretary of state might consider that only in exceptional circumstances should he intervene in matters of purely Indian interest where the government of India and the legislature were in accord. In the case of tariffs it was suggested that a convention should be allowed to develop under which the government of India and the legislature might impose such duties as they desired without regard to the

¹ *House of Lords Debates*, XIV, 1674 ff.; contrast Curzon, XVI, 484.

² S. 33.

interests of British manufacturers, but with due consideration for Indian consumers as well as manufacturers. The concession thus made was very important, for the government of India was naturally more or less indifferent to the interests of British trade, especially as popularity with Indian politicians could easily be obtained, and it was natural that the Indian manufacturers, who had many friends in the legislature, should press for the adoption of a policy of high protection for their products which paid scant attention to the needs of consumers. The principle of acceptance of the combined view of the government and legislature of a province in transferred matters was accepted, and the joint committee recommended its adoption in respect of reserved matters also. It is dubious if in making these recommendations the joint committee intended that India should be at liberty to negative the idea of imperial preference, but the point was not specifically taken and the Indian government showed no desire to make it effective. Yet the joint committee had suggested that that intervention in fiscal matters was justified to safeguard the international obligations of the Empire or any fiscal arrangements within the Empire to which His Majesty's Government was a party, and the principle of imperial preference might well have been regarded as included in the latter head.

The many matters dealt with by rules under the Act were to be effected by rules made by the governor-general in council with the sanction of the secretary of state in council, and such rules were not alterable by any legislature. They must, however, be submitted after enactment to both Houses of Parliament and might be cancelled on the request of either house. In his discretion the secretary of state might present them in draft for approval by both Houses in which case they need not subsequently be laid.¹ In order to secure due consideration of rules laid before the Houses and of enactments similarly laid, the joint committee favoured the appointment of a joint committee of the Houses, and this course was duly adopted.

While the power of advising the disallowance or assent to Acts or Bills remained with the secretary of state in council, it was provided that the formal disallowance or assent should

¹ S. 44.

be expressed by the King in Council.¹ This change, recommended by the Crewe committee, was manifestly proper when the legislatures became representative.

By an important decision recommended by the Crewe committee it was resolved to separate the agency work of the India Office from its political business, and to establish by Order in Council a High Commissioner with such functions as might from time to time be imposed on him.² The High Commissioner thus differed in large measure from the officers representing the Dominions in London whose functions tended to increase in political importance.

(e) THE CIVIL SERVICES IN INDIA

Special provisions were felt necessary to regularize the position of the civil services in India, as they had developed in somewhat haphazard manner, and the advent of control by the legislatures even in minor degree rendered it essential to remove all legal doubts and to distribute control for the future.³ All existing rules by whatever authority made were declared valid, but alterable by the rules to be made in future. The general power of making rules regarding the classification of the civil services in India, the methods of their recruitment and the conditions of their service, pay, and allowances, discipline and conduct, was vested in the secretary of state in council, who might delegate the power to make rules to the governor-general in council or to local governments and might authorize the Indian or local legislatures to regulate the public services, subject to the rule that any civil servant appointed before the commencement of the Act should retain his rights or receive equitable compensation therefor. Pensions similarly could not be varied to the disadvantage of existing rights. The general principle was laid down that every person in the civil service of the Crown held office at pleasure and might be employed in any manner required by a proper authority within the scope of his duty, but no person could be dismissed by an authority inferior to that by which he was appointed, and the secretary of state in council might reinstate any person

¹ S. 43.

² S. 35.

³ S. 36.

dismissed. Any person appointed by the secretary of state in council was given a right to secure the review by the governor personally of any order by an official superior by which he believed himself to be wronged.

In imitation of the Civil Service Commission in the United Kingdom and like bodies in the Dominions power was given¹ to establish by Order in Council a Public Service Commission of not more than five members, to hold office for five years, but with eligibility for reappointment, and removable only by the secretary of state in council. Its functions were to be prescribed by rules by the secretary of state in council, and might extend not merely to recruitment as in the United Kingdom but to control. The secretary of state in council was also² authorized to facilitate the admission of Indians to the Indian Civil Service by making rules respecting the admission of persons domiciled in India. The interests of the services were in all these matters safeguarded in some degree by the rule that the majority of votes in council was required for action, while in the case of rules for admission of domiciled Indians to the service they must be laid before both Houses of Parliament for thirty days before taking effect.

Finally, the diminution in detailed control of finance by the India Office was in part compensated for by the provision that no office might be added to or removed from the civil service, and no remuneration varied, without consultation by the government concerned with a finance authority designated in rules,³ and the secretary of state in council was authorized to appoint an auditor-general with such functions as might be assigned to him. These rules and all those made regarding the civil services required the assent of a majority of votes at a council meeting, and formed part of the independent functions assigned to the secretary of state in council.⁴

The structure created by Parliament was obviously so complex that revision must be contemplated. It was thought fit to give a breathing space of ten years from the passing of the Act. Thereafter the secretary of state with the concurrence of both Houses of Parliament was to appoint, with the approval of the

¹ S. 38. Commissions were provided for Madras (Act XI of 1929) and the Punjab (Act II of 1932).

² S. 37.

³ S. 39.

⁴ S. 40.

Crown, a commission to inquire into the working of the system of government, the growth of education and the development of representative institutions in British India, and the commission was required to report whether and to what extent it was desirable to establish the principle of responsible government or to extend, modify, or restrict the degree of responsible government then existing therein, including the question whether the establishment of second chambers in the provinces was or was not desirable. The Crown might also refer to the commission for report any other matter affecting British India and the provinces.¹

(f) THE INDIAN STATES

The Report recognized to the full the importance of the position of the states and the effect which the reform scheme must have on their interests. It recognized that a certain degree of uncertainty as to their future was being widely felt, and this was attributed to certain causes. The term Native States had been applied to states of very different standing, and the rules applicable to minor rulers might have been applied to major states without sufficient regard for the difference of stature. Further, the treaties had come to be interpreted largely by usage, and there had been derogation, often necessary and proper, from their strict terms. It would be desirable to codify the existing practices with due regard to treaty rights. Further, it was desirable to place on a regular basis the system of consultation with the princes, inaugurated by Lord Hardinge and carried further by Lord Chelmsford, by establishing a Council or Chamber of Princes² to meet the viceroy annually for discussion of issues of common interest. A standing committee of that body might be consulted by the political department on issues referred to it. Difficulties between two states or a state and a local government or the government of India might be referred for report by a commission presided over by a judge, and consisting of one nominee of either side. If the viceroy could not accept their finding, he would refer

¹ S. 41.

² The minor rulers were not to share in the chamber. See Chapter X, §24, below.

to the secretary of state. Similarly in the case of charges against a ruler investigation might be entrusted to a judge, two ruling princes, and two other persons.¹ It was further proposed to place all important states in direct relations with the viceroy instead of with local governments as was then often the case, and to arrange for some means of consultation between the princes and the representatives of British India.

The vision of the authors was of the provinces as self-governing units under a central government dealing with issues of common concern, defence, tariffs, exchange, opium, salt, railways, posts and telegraphs, all matters interesting the states, whence it followed that an ultimate federation must be the ideal. But they deprecated any efforts to hasten a result, for which natural causes were working.

¹ Resolution 426 R., October 29th 1920, applies the procedure to (1) cases of depriving a ruler of rights or dignities, (2) debarring the heir apparent or other members of the family from succession.

CHAPTER IX

THE OPERATION OF THE REFORMS, THE REPORT OF THE SIMON COMMISSION, AND THE ROUND TABLE CONFERENCE

1. THE OPERATION OF THE REFORMS

BEFORE the Act of 1919 could be passed into law, matters in India had assumed an aspect unfavourable to the atmosphere of good will indispensable for working so complex a machine, for which the King in his proclamation of December 23rd and the Duke of Connaught in opening the Indian legislature made earnest appeal. The post-war conditions of India were as unsatisfactory as those of Europe in general. Large fortunes had been made in which the workers and peasants did not share, the influenza epidemic had killed thirteen millions and left others debilitated, and politicians soon concluded that there was no serious intention to make good the hopes excited in 1917. Unfortunately, among those who formed this conclusion was a man of remarkable character, M. K. Gandhi, whose appeal to his countrymen was due to many causes, his approximation in outlook and practices to the Hindu ascetic ideal, his humble bania caste which won him wide sympathies among men of substance, his knowledge of industrial issues, his readiness to take up the cause of the depressed classes, the mill-workers, and the Indians overseas, where he had won honourable renown for his championship of the Indians in South Africa. He had practised with success in South Africa the doctrine of passive resistance and had proved the merits of the tactics of driving the government to repression measures which attracted sympathy to those against whom they were directed. He had the advantage that his idealism had won him high repute overseas, especially in America, and that through him there was a growing tendency outside the United Kingdom for the giving of sympathy to any cause he advocated, while in the United Kingdom he was certain of appealing strongly to Liberal and Labour idealism.

An opportunity to attack the government on favourable ground was soon presented by the Bills introduced to carry out the recommendation of the Rowlatt Committee regarding the control of the Press, and the trial of political offenders by judges without juries, and the internment of persons suspected of subversive aims. Violent protests were directed at projects of no great importance, and Gandhi put in operation his doctrine of passive resistance under which the law was defied on the plea of adherence to the ideal (satyagraha) but without resistance (ahimsa). The old Indian plan of a hartal, or day of fasting and abstention from business, was revived with spectacular effect. In March and April 1919 disturbances were not rare in the Punjab and the west of India; the pressure of the war-period recruiting had been grave in the former, and the west had been distinguished by scandalous profiteering, none of the profits being expended on the proper and necessary improvement of the conditions of the overcrowded and badly paid workers. Unhappily the outbreaks coincided with strained relations with Afghanistan, which resulted in Afghan attack and defeat in May¹ and led to the declaration of martial law in the Punjab on April 15th.² This followed on rioting on the 10th when several Europeans were disgracefully murdered, and on the 13th the episode of the Jallianwalla Bagh, when, on the defiance of General Dyer's orders forbidding meetings, a meeting was held, and dispersed by his orders with the loss of 379 killed and over 1,208 wounded. The general appears not to have realized that the space was enclosed so that dispersal was impossible, but his official defence, probably owing to second thoughts, insisted that the firing was carried out to produce such a moral effect as would secure order in the Punjab. At the time his action was approved by the local government and under martial law which lasted until June 9th a good many indignities were imposed on Indians in areas believed to be disaffected. Unquestionably the episode should forthwith have been inquired into in fairness to all concerned. Only in October was a committee under Lord Hunter³ appointed to investigate, and it condemned General Dyer's action on the irrefutable ground that the duty of the military in such cases

¹ Parl. Paper, Cmd. 324.

² Cmd. 534 (1920).

³ Cmd. 681.

is to take such action only as is essential to prevent loss of life and destruction of property by the rioters, and that ulterior views such as that of striking terror into the rest of the province must be disregarded. General Dyer's action was also disapproved by the secretary of state¹ and the Army Council, but it found defenders in the Press, the House of Lords, and years later in the considered opinion of Mr. Justice McCardie in a case in which the officer who had been lieutenant-governor of the Punjab at the time successfully defended his conduct on that occasion. The episode unhappily cast a dark shadow over the inception of the reforms and brought racial feeling out far more bitterly than at any time since the Mutiny. Lord Hunter's committee unfortunately divided on racial lines on the questions of the effort of the war administration of the province and the necessity of enforcing martial law. Here again the delay in the investigation tended to unsatisfactory results, for by the time it was held the menace from Afghanistan had passed away in the defeat of the Afghan forces by the resources of aircraft, high explosives, and wireless telegraphy, now for the first time employed to full advantage in frontier war, and it was easy to overlook the fact that at the time the situation was one of great danger. Even when peace was signed, the government of India recognizing the Amir as independent, dropping the former subsidies and closing the frontier to transit of arms, it remained to subdue the Mahsuds and Waziris, whose enmity was rendered serious by the enormous mass of modern rifles which had passed into the country.² After investigation by a committee in 1921 the plan of opening up the Mahsud and Waziri country by providing roads and raising local levies, backed by regular forces at Rasmak and Manzai, was adopted. But the risk from the frontier remained operative, though Amanulla gradually became more friendly, his propensities for modernization leading to his overthrow in 1928 and the advent to the throne of Nadir Shah, whose assassination in 1933 did not alter the friendly relations he had established with the Crown.

A further cause of estrangement between Indians and British affected the Muslims in the first instance. The attitude

¹ Cmd. 705.

² Parl. Papers, Cmd. 310, 398 (1919).

of the British Government towards Turkey, as seen in the treaty of Sèvres, was deeply resented, and unhappily Mr. Montagu, by publishing in 1922 the views of the government of India on the course of relations¹ offended against a fundamental principle of cabinet solidarity and was forced to resign, thus giving India the impression that its friend had been forced out of office by intransigent Conservatism. With their inevitable skill in fishing in troubled waters, the Moplahs, part Arab Muslims in Malabar, broke into revolt which took the form of forcible conversion of many unfortunate Hindus and massacre. This fact weakened the affection of political Hinduism for the khilafat movement, which further suffered from the decision of the Angora Assembly in 1924 to abolish the office and exile the last holder of it. But it had sent thousands of devout Muslims on a fruitless mission to Afghanistan and very naturally, if illogically, the blame for their sufferings fell on the British Government when the disappointed emigrants returned disillusionized home.

It was under these unhappy circumstances that the reform elections were held in October 1920. The Congress party boycotted them, but about a third of the electorate of six millions went to the polls which was no mean result in view of the boycott, the vast extent of the constituencies, the absence of any immediate issues, and the painfully high proportion of illiterates among the voters. It was found fairly easy to secure ministries in the provinces, but the ministers had to be chosen from a variety of political and communal groups, and it early appeared that collective responsibility would be impossible to secure. Ministers could not be, and were not, chosen because they had a common policy, but because they were leading men of groups strong enough to insist on representation in the ministry. There was, however, an exception in Madras, where the non-brahmans had secured unexpectedly a large number of seats and the ministry could be selected so as to present their views. In that case Lord Willingdon contrived to secure something reasonably approaching a British cabinet through the co-operation of both sides of his government.²

¹ Ronaldshay, *Lord Curzon*, ii, 285, 286; Keith, *Governments of the British Empire*, p. 277.

² On the working of dyarchy, see Parl. Paper, Cmd. 3568, pp. 203 ff. In Bengal

Unfortunately ministers fell on evil days in the matter of finance. The contributions to be required from them were fixed by the Meston Committee at rates which were certainly high, but which had to be enforced, because the campaign against Afghanistan, the partial failure of the monsoon in 1920, and world conditions all contributed to confusion in Indian economics and finances, the rupee falling in no great period of time from three shillings to half that amount in value. At the same time the bad harvest and the increased cost of anti-revolutionary measures affected provincial finances. There was small scope for expenditure on nation building in any form, and ministers soon realized that, when challenged on issues of efficiency, they were able to meet criticisms and add to their popularity by disclaiming responsibility on the score that finance was in the hands of the official government which required so much for reserved subjects as to leave wholly inadequate sums available for the ministry. The difficulties of the financial system thus manifested themselves in their most complete form, and proved the essential unreality of talking of responsible government when ministers were not effectively in control of any side of finance. Yet another obvious disadvantage lay in the fact that the ministers had only a limited control over their officials; in fact they received in the main willing and effective service, but it was always possible for a minister to suggest that his work was hampered by the fact that officials could defy him. The rule under which the permanent heads of the departments were required to bring to the notice of the governor matters of importance affecting his responsibilities, and had direct access to him, unquestionably secured efficiency in large measure, but it did obscure the responsibility of ministers. But even more destructive of true responsibility was the need as a normal rule of winning the support of the official bloc. A ministry which was on good terms with the official side of the government possessed a sound basis of support which rendered it possible to hold office although the parties represented by ministers were weaker than

also when ministries could be formed they acted with the executive council, but transferred subjects had to be taken over for a time in 1925; cf. Banerjee, *A Nation in Making*, pp. 333-91. The Central Provinces had a like experience. See also Paper 70-230 (1928).

their opponents. A healthy development on normal party lines, which is requisite for the working of responsible government as understood in the United Kingdom, was impossible when each council was composed of so many sectional interests, and though in different circumstances the system developed rather in the direction of ministers supported precariously by combinations of groups based on agreements to further sectional ends rather than on any wide divergence of policy. Nor could the enormous influence of the governor as an expert be ignored; it tended to weaken ministers' importance and initiative and to reduce them to the advisers of a more or less independent governor. But that did not prevent much good work being accomplished in education, in sanitation, in local government. The chief errors in these fields lay in the reluctance of the ministers to impose adequate control or when imposed to exercise it, and it was to this factor that there was due some of the deterioration of the effectiveness of the administrative machine which marks this period, side by side with a genuine desire to effect important reforms. In 1920 a very striking example was given of the desire of the government to make the share of Indians in government real, when Lord Sinha was made governor of Bihar and Orissa.

The legislative assembly during this period showed its real importance and value as a critic of the government; naturally its interests were focused on the issues which had so often been dealt with by the National Congress, finance and army expenditure. Substantial victories were achieved on every side, though their importance was underrated by men who had demanded responsible government at the centre and disliked everything done by an official government. The old dispute over tariffs was largely ended. The Indian government without much regard for British interests set about evolving a system of protection for Indian industry, in which the interests of the consumer as usual went to the wall. A Tariff Commission, the precursor of the Tariff Board, was set up to report on projects of protection and soon the principle was in full force, suggestions of British preference being greeted with much coldness.

Currency and loan issues evoked deep interest, and censure was freely lavished, not perhaps without cause, at the raising

in 1921 of a loan at 7 per cent, while all manner of criticism was addressed against the mode in which the secretary of state managed financial relations between India and the United Kingdom; always a delicate operation, it had become more and more complex with the breakdown of the normal exchange system. The complaints led to the appointment of the Currency Commission and to an understanding that India should have a larger say in regard to the flotation of loans. The same spirit of criticism was addressed to the budget, and when Sir B. Blackett in 1923 determined to end the period of deficits by doubling the salt tax, the opportunity of winning popularity as protectors of the poor was eagerly seized by the legislators, whose intransigence forced the governor-general to certify the measure rather than remain in deficit. Yet in the main the legislature was not disposed needlessly to oppose the government. The process of certifying Bills was avoided; feeling, however, against the princes ran sufficiently strong in 1922 to compel the certification of a measure intended to protect the princes from attacks on them in British India calculated to bring them into disrepute in their states. There was distinct need for the measure in theory, but it proved in practice difficult to operate and the certification was rather unfortunate.

In the field of defence great strides were made, though scant recognition was accorded to this fact. The war had had the essential result of rendering in 1917-18 Indians eligible for the King's commission as opposed to that of the governor-general, and a small number of such appointments had been made. But it left India with an army whose cost in 1921 was eighty-two crores of rupees as against a pre-war average of thirty crores, a burden of the most severe character. No wonder that it was easy and popular to denounce the cost of the army, to assert that it was largely due to the heavy charges involved in employing British troops, and to denounce the government for failing to build up an Indian army manned and officered by Indians. Unfortunately the politicians were presented with a genuine grievance in the report issued in October 1920, of the Esher Committee,¹ for that document

¹ Cmd. 943; see Sir Sivaswamy Aiyer, *Indian Constitutional Problems*, pp. 111 ff., 176 ff. for a strong criticism.

unquestionably could be understood to advocate treating the Indian army as maintained as part of the scheme of imperial defence, a conception not adopted in pre-war days. It was of course in the light of war experience easy to feel that the earlier policy had from a military standpoint been mistaken, but it was not realized that the vital political changes rendered it impossible to decide army policy in India without regard to Indian national feeling. Fortunately in the commander-in-chief, Lord Rawlinson, Indian politicians found an authority who sympathized with their aspirations while conscious of the essential dangers of the position in a manner which was foreign to his critics. He explained authoritatively in 1921 the essential functions of the army, the field army for foreign service, the covering troops to hold the frontier, and the internal security forces, to preserve security at home, and the mode of application of these doctrines in India. He spared no effort to secure efficiency at less cost, and in four years the expenditure fell to fifty-six crores, the British troops being brought down from 75,000 to 57,000, and the Indian from 159,000 to 140,000. The foundation of a territorial force purely Indian in 1923 opened up the army to middle-class Indians in a manner similar to that in which the formation of the auxiliary force had opened it to Europeans and Anglo-Indians. But of vital importance was the question of Indianizing the command of Indian regiments, and for this purpose in 1923, eight units¹ were marked out that arrangements might be made to render them in the rather distant future completely Indian in personnel. This necessitated, of course, opening training at Sandhurst to Indians specially selected, and this naturally led much later (1928) to their admission to Woolwich and Cranwell also, but for the time being the establishment of an Indian counterpart to Sandhurst² was naturally deemed premature. It must be remembered that even thus early the difficulty of securing suitable Indian candidates for the army had presented

¹ Five infantry battalions, two cavalry regiments, and a pioneer unit only. No commissions in artillery, engineers, etc., were then contemplated. Cf. Maurice, *Lord Rawlinson*, pp. 284-6. In 1922 a complete technical reorganization was carried out.

² Recommended by the Indian Sandhurst Committee under Sir A. Skeen (1926). It disapproved the eight-unit plan, but its views on that point were rejected. *Parl. Paper, Cmd. 3568*, pp. 98 ff.

itself. The elements in India whence officers could be expected to come were limited, for the prospects of civil service or law or commerce rendered able youths singularly unwilling to seek commissions. But this fact was deliberately and not very candidly ignored by the critics of the government, who were naturally appalled to find how long it must be before there would exist Indian units under Indian control, forgetting that the process of evolving a capable commander is necessarily slow.

Much useful legislation was passed both by the Indian and by the provincial legislatures. The former amended the Factories Act, passed a Mines Act and provided for workmen's compensation, while the latter made serious contributions in provisions for local government, education, and health.

At the same time steps were taken by the British Government to enhance in the eyes of the world the new position of India. Despite the admitted domination of Indian foreign policy by the British Government, India was treated as on a footing of equality with the Dominions in the issues which arose from the treaties of peace, and these treaties were duly signed specially for India, as they were for the Dominions. Of essential importance was the grant to India of a place in the League of Nations on a footing of equality with the Dominions, and India was not merely included in the Labour Organization under the League Covenant, but received in the former the recognition due to her position as one of the chief industrial countries of the world. Moreover, the policy of treating India as on the same footing as the Dominions was shown by her representation at the Imperial Conference of 1921 and 1923, where the Indian representatives manfully struggled to secure practical recognition of the admitted anomaly of the position of India as an equal member of the Empire and the existence of disabilities upon British Indians lawfully domiciled in other parts of the Empire. All these matters, however, failed to secure appreciation of the British attitude. It was felt merely that the Indian delegates to the League and the Imperial Conference were no more than mere spokesmen of the British Government and that India was not accepted in either body as really of Dominion status. The result was disappointing, as it

might have been hoped that consciousness of national status would have reconciled politicians to acceptance of necessary delay in evolving responsible government. But Gandhi and Congress with him had definitely declined any programme of moderation. He had secured control over Congress in 1920 by preaching the doctrine of swaraj to be conceded within a year, and his failure, together with the Moplah rebellion (August 1921) and the riots induced by his non-co-operation policy when the Prince of Wales visited India (November 1921), discredited him and his principles,¹ and these adverse factors were followed by the ghastly murder of twenty-one police-officers by his National Volunteers at Chauri Chaura in February 1922. It elicited from Gandhi a declaration of horror at the outcome of his teaching, and, luckily enough for him in his distracted condition of mind, the government acted, and on its charges he was convicted and sentenced to six years' imprisonment, later reduced to two.

This eclipse of the advocate of non-co-operation led to the control of Congress by Mr. C. R. Das and Pandit Motilal Nehru, who preferred to enter the legislatures and obstruct the government from that vantage-point. Common sense of course would have induced from the first entry into the legislatures and effective working of the machinery of government with a view to obtaining control of it. But the new policy at least was better than mere negation; as such it was widely approved and the elections for the provinces and the assembly showed substantial success for the policy, the Congress men carrying two provinces and providing the central legislature with a solid bloc of forty-five members. Their position negated, inevitably, the possibility of the gradual evolution of dyarchy into full responsible government. The Congress was determined to destroy the constitution, and naturally enough was concerned not with the morality but the efficacy of the means which it employed for this end. Moreover, their hopes were encouraged by the advent to office of the Labour government in the United Kingdom, as the Prime Minister with wonted lack of balanced judgment had pronounced himself in earlier days in

¹ Congress at Ahmadabad (December 1921) authorized mass civil disobedience and gave Mr. Gandhi dictatorial powers to challenge the government.

favour of great concessions to Indian sentiment, and Congress did not realize how much a politician may change his views when he is in a position where he may carry them into effect. Disillusionment increased bitterness, and led to the deliberate destruction by the Congress majority of the working of dyarchy in Bengal and the Central Provinces, compelling the governors to take administration into their own hands. In the central legislature, where the government was safe from attack, the Swaraj party in 1925 walked out from the legislature in a body and remained outside, declaring that in their absence the legislature had no right to continue functioning.

It was under this feeling of captious criticism that the report of the Lee Commission,¹ appointed by Lord Peel in 1923, was received. The report in fact went very far in urging the acceleration of the Indianization of the services, suggesting that two-fifths of the annual requirement of new members for the Indian Civil Service should be selected in India, two-fifths in England, and one-fifth promoted from the provincial service. It was also willing to provide for the steady equalization of numbers in the Indian police, and the government accepted its suggestions, with the result that from 922 Europeans in the Indian Civil Service in 1928 there was a decline by January 1932 to 843, and for the police the figures were 569 and 528 respectively. Moreover, the Commission recognized that save in these two services and in such technical work as irrigation engineering the process of Indianization had definitely taken root, and the elimination of Europeans was merely a matter of time. It might have been expected that the sincerity of the government's policy in this regard was proved, but in fact the chief attitude was complaint at the slowness of progress.

Play was also made with considerable success with the Asiatic grievance regarding the anti-Asiatic attitude of the Dominions,² and the fact that the government of India could do little to secure just treatment of Indians overseas was naturally made the occasion for propaganda to secure the separation of India from an Empire which could not treat

¹ Parl. Paper, Cmd. 2128 (1924).

² Keith, *The Governments of the British Empire* (1935), pp. 195 ff.

Indians abroad with decency. General Smuts, in 1923, in fear of a general election, was peculiarly intransigent, declining Sir Tej Bahadur Sapru's suggestion of the appointment of a Committee of Inquiry to visit the Union. Naturally General Hertzog was still less favourable to Indians, and pushed forward proposals which would have further and most seriously restricted the rights of Indians to live and trade in areas where as petty traders they could earn profits. Fortunately it was found possible at last to establish personal touch, and an accord was reached in the Union in 1927. But this agreement, though it bound the Union government to seek to aid domiciled Indians to attain a European standard of life as the condition of their permanent settlement in the Union, was essentially intended to secure Indian governmental co-operation in repatriating Indians, on the score that they formed an unassimilable element in the population, and added seriously to the complexities of a difficult situation as between Europeans and natives and coloured persons. Even more harm was done by the discussions over Kenya, for which the imperial government was responsible. At one time (1922) it seemed as if racial discrimination would be dropped, but Conservative dislike of recognizing the equality of native races prevailed, and the result was in 1923 the acceptance of communal electorates which gave the European population an unfair share of the seats available. Segregation, which had been proposed was stopped, largely because it proved impracticable, and immigration was not absolutely barred. But unquestionably the position presented a serious grievance, for the reservation of the highlands for European settlement only was racialism undisguised, and the hectoring attitude adopted by the European settlers towards the government of the colony and the reluctance of the Colonial Secretary to assert his authority encouraged Congress in the belief that justice was unobtainable by peaceful persuasion, and that the British Government could yield to force what it denied to reason. The very justifiable feeling that neither there nor in any other part of the Empire were Indians heartily welcome went far to embitter resentment and to encourage propaganda in favour of independence.

High hopes were in some quarters entertained when in 1924

a committee under Sir A. Muddiman¹ was set up to examine the working of the system, but these were overthrown when the report was actually presented to Lord Birkenhead in the following year. It turned out that the majority of three British and two Indian members held their function to be restricted to the making of suggestions for the better working of dyarchy, while the minority of four Indian members including Sir Tej Sapru held that dyarchy was unworkable and possessed inherent demerits explaining the difficulties enumerated in its operation by the provincial governments. This denunciation of dyarchy was readily taken up in India by politicians generally, and Lord Birkenhead welcomed it on July 7th 1925 on behalf of the orthodox Conservatives, holding that dyarchy was a pedantic arrangement unsuited to Anglo-Saxons and therefore to those whose political ideas were based on Anglo-Saxon ideas. Congress for its part sponsored a National Demand movement for a Round Table Conference whose business it would be to draw up a constitution according India full Dominion status. Some members indeed showed a more realistic attitude. Mr. V. J. Patel consented to become President of the Assembly on the expiry of the four years for which the first President had been appointed, and Mr. C. R. Das before his untimely death (June 16th 1925) entered into communications with Lord Birkenhead which suggested that, had he lived, he might have sought to guide Indian politicians along the path of fruitful co-operation,² based on the value to India of the imperial connexion and on recognition of the difficulty inherent in establishing self-government in a country permeated with communal spirit, excited to fresh manifestations by the prospect of the passing away of British control. Unhappily with him perished the best chance of the evolution of a party of responsive co-operation.

Another unhappy feature of the operation of the reforms was the inevitable impetus given to sectarian strife. It was obvious to Hindus and Muslims alike that the change in the form of government meant the possibility of securing effective domination by legal means; especially in the case of Bengal and the

¹ Parl. Papers, Cmd. 2360, and 2 vols. of evidence; Pole, *India in Transition*, pp. 58 ff.; Sir Sivaswamy Aiyer, *Indian Constitutional Reform*, pp. 59 ff.

² Bose, *The Indian Struggle*, pp. 123-32.

Punjab, where numbers are fairly balanced, was this effect seen in operation. Hindu-Muslim¹ tension showed itself fiercer and fiercer with the passage of the years, and confusion was increased by the efforts made on either side at conversions. It must be remembered that perhaps five-sixths of the Muslims of India are the descendants of converted Hindus. It was natural that the Arya Samaj should seek to proselytize the poorer Muhammadans, while the lower-caste Hindus offered a fertile field of missionary enterprise for the Muslims. A further complication was produced by the movement patronized by Gandhi to improve the status of lower castes and outcastes in the Hindu community. Reform movements appeared among the Sikhs, which had grave political consequences; the Akalis, in their zeal for purity of religion, fell foul of the vested interests which opposed reform; a ghastly massacre perpetrated (1921) by Pathans employed by the Mahant of Nankana Sahib proved the necessity of government intervention and of legislation² for the due management of the holy shrines, but not until grave unrest had been caused between the rulers of Nabha and Patiala. It was one of the minor disadvantages of the new state of affairs that communal tension spread to the Indian states, since it was obvious that the Crown must interfere to maintain order in case of grave unrest. Among the Muslims also there was propagated a wild but not negligible scheme for the creation of a Muslim state based on Afghanistan and embracing all those north-western areas where the faith is strong. Such a state inevitably would form a permanent source of danger to India.

It was manifest that no solution of the difficulties of the position lay in dyarchy, which had never operated in any effective sense and in which no one, European or Indian, had any real belief. But the policy of 1919 had a definite effect in diminishing the driving power of the Indian Civil Service, whose members realized that the old possibilities of high office and power were vanishing and that they would be well to seek some other career for their sons, even if they cared to stay to the

¹ The census of 1931 gives 177·2 million Hindus, 66·5 million Muslims, 3·2 million Sikhs, 3·6 million Christians.

² Punjab Act VIII of 1925 (superseding an Act of 1922); Indian Act XXIV of 1925, as to appeals, these being beyond provincial power.

end of their normal years of service, instead of accepting the possibility of retirement on a proportionate pension. It was therefore of real importance that Lord Reading's successor as governor-general, Lord Irwin, came to his task in 1926 with the constructive ideal of achieving harmony in India between Hindu and Muslim, and co-operation with the British elements in securing the political advance of India. He found Hindu-Muslim bitterness at its height, and one of his first efforts was by means of conferences at Calcutta and Delhi to bring the leaders of the two religions into agreement, though without much success. Moreover, at this critical period a new reinforcement was gained by the cause of Congress. The Currency Commission¹ recommended that the rupee should be stabilized at 1s. 6d., while Sir Purshotamdas Thakurdas in a dissenting report urged the adoption of 1s. 4d. This plan naturally appealed to the cotton manufacturers of western India, who argued that they were speaking also in the interests of the agriculturists, and Congress now received the influential support of the representatives of Indian commerce. They had long been jealous of the position of British commercial interests, and American agents had been quick to assure them that British industry and finance were declining fast, and that it was wholly to the disadvantage of India to remain tied to the British system. They added to the strength of Congress and impressed on its policy a definite tone of hostility to British trade which was to affect substantially the future constitution.

2. THE SIMON COMMISSION REPORT

It was in these difficult conditions, aggravated by the cleverness of the Congress in sponsoring at the suggestion of Jawaharlal Nehru and Subash Chandra Bose a youth movement which appealed to the excitable and half-educated young men with irresistible force, that the British Government decided to obtain the sanction of Parliament² for the acceleration of the appointment of the Commission of Inquiry provided for after the lapse of ten years by the Act of 1919. The matter was

¹ Parl. Paper, Cmd. 2687 (1926).

² 17 & 18 Geo. V, c. 24. The commission of seven included two Labour members and one Liberal, Sir J. Simon.

mismanaged from the first,¹ and Indian moderates were induced to share the Congress attitude of unreasoning hostility. The seven members first selected were all British, and it was only later that it was laid down that they were to co-operate with the elected members of the Indian legislature, who were to report simultaneously but not jointly with the British members. The necessity for information was clear, but shortsighted agitation resulted in the great parties and the Central Assembly boycotting the Commission, though the provincial councils as a rule took a much more sensible view and enabled the Commission to acquire much essential information. What was worse, local branches of Congress openly condoned the campaign of political assassination which broke out in Bengal and the Punjab and spread to the rest of India. Violence also marked the strikes which cost the country thirty million working days in 1927-8, and which in some degree were prompted by communist propaganda,² working on the perfectly intolerable conditions under which Indian labourers were employed in the textile factories.

In response to the challenge of the Commission a party truce was arranged, and in 1928 an All Parties' Conference drafted a constitution of an interesting kind, resting essentially on the doctrines of full responsible government, though some effort was made to safeguard the question of defence preparations. But the report contemplated the system of joint electorates with reserved seats for minorities only³ and for ten years as the manner in which effect should be given to the guarantee of Muslim rights, and this introduced a serious element of discord between the Muslim and Hindu members of the Congress. At its Lucknow session Maulana Shaukat Ali attacked the proposals, and the result of the project was the revival of the Muslim League as the outcome of the belief that agreement with the Hindus would not accord the safeguards for Muslim interests necessary. On the other hand, the importance of the backing of the Congress programme by the industrialists was

¹ Polc, *India in Transition*, pp. 72 ff.

² In December 1927 Communist strength was seen at the All-India Trade Union Congress.

³ This denied the Muslim demand for reservation of a majority of seats in Bengal and the Punjab. The Sikhs also refused to accept the proposals.

seen in the support given by Muslims and Hindus alike to the proposals of Mr. S. N. Haji's Bill to regulate the coasting trade by the process of reserving the right to participate in it to Indians. It was of course impossible to secure the passing of so confiscatory a measure, but it afforded a warning of the hostility to be shown to British trade and the necessity of anxious safeguarding. Further, the strength of Congress was focused and strengthened by the decision at the meeting of Congress at Calcutta in December 1928 to welcome Gandhi as leader, for he was able to consolidate the alliance of the industrialists with political extremists and to secure the necessary funds for the payment of volunteers to carry out the policy of Congress, and his popularity in the United States was deemed an asset in the campaign to eliminate British influence. Moreover, his connexion with South Africa was taken advantage of to determine on the taluka of Bardoli in the Surat district as the scene of a no-tax agitation, because many of the ryots there were emigrants who had returned from South Africa. On the other hand, the general belief that concessions must be made by the British Government was strengthened by the Labour victory of 1929, for the new Prime Minister was judged by his ideals for India expressed in the irresponsibility of opposition by a politician whose talent was chiefly journalistic, and the anticipation resulted in renewed efforts of groups of interests to perfect their organization. Hence the Hindu Mahasabha stressed orthodox Hinduism, and the depressed classes began to organize under the leadership of Dr. Ambedkar, and Rao Bahadur M. C. Rajah.

For the moment the government of India was content to urge the passing of the Public Safety and the Trade Disputes Bills,¹ justifying these unpopular measures by allegations of serious communist conspiracy, and fortifying their arguments by instituting proceedings against three British and twenty-six Indian industrial agitators. The proceedings were deliberately protracted by the defence, showing clearly the defects of the judicial system when the accused desire to exploit them, but the prosecution was doubtless badly planned, for when it was

¹ Act VII of 1929. It adopts part of the Trade Disputes and Trade Unions Act, 1927.

at last after five years concluded, the sentences imposed were drastically reduced on appeal and some convictions were not upheld. The court unquestionably did its best, but it was easy to misrepresent its proceedings. Moreover, the government was harassed in the Assembly by the quite unfair tactics of the Speaker, who instead of confining his activities to the control of debates lent his energies to endeavouring to frustrate the plans of the government and so bring it into contempt,¹ just as his brother was attempting to do as leader of the agitation at Bardoli. It must be admitted that the futility of the session was not without importance in moulding policy. It seems to have led to the decision of Lord Irwin to impress by a personal visit to England on the new ministry the impossibility of working a government which was purely official, when exposed to irresponsible criticism by an Assembly whose members were not restrained by the knowledge that, if they defeated governmental projects, they must be prepared to take office and themselves become the object of attack. The fruits of this visit were momentous, for the governor-general came back with authority to ask representatives of Indian opinion to meet in conference British representatives, and on October 31st it was intimated that Dominion status was the natural issue of the constitutional progress of India. The statement was far-reaching in its consequences, and strengthened the claim that India should deal on a footing of equality with Britain. Mr. MacDonald at the British Commonwealth Labour Conference on July 2nd 1928 had welcomed the idea of seeing within a few months a new Dominion added to the Commonwealth as an equal, and Indian politicians might be excused if they assumed that he meant what he said, and that the Round Table Conference contemplated was intended to settle the basis of a constitution of Dominion type based on equality as proclaimed by the Imperial Conference of 1926. But neither the Conservatives nor the Liberals were prepared to accept so radical an idea, and the result was seen when Gandhi was received by Lord Irwin, a few hours after an attempt (December 23rd 1929) to assassinate him. The demand that the Conference should

¹ As he improperly refused to allow discussion of the Public Safety Bill, it was passed as an Ordinance.

draw up a scheme for full Dominion status to operate forthwith was necessarily denied, and Congress at Lahore retaliated by demanding complete independence.

In striking contrast to the ideals of Congress stood the views of the Simon Commission which were issued in May 1930. The report¹ received little of the sympathy which was its due, and its merits were such as to render it unpopular throughout India. It emphasized in a perfectly fair manner the fundamental difficulties of the Indian situation, the racial and communal dissensions, the problem of defence and its bearing on British control, and the necessity of considering the position of the states in any constitutional reconstruction. These matters essentially demanded candid reflection in India, and it was imperative to make them clear to British politicians. The state question had been long allowed to remain in abeyance. British Indian politicians seem to have contented themselves with the view that, when responsible government was attained, as it must be in due course, the government of India would continue to exercise the powers which it then possessed as regards the states. But such a view was naturally wholly repugnant to the minds of the rulers, who had taken advantage of the changed attitude towards them of the paramount power since Minto to develop claims for full consideration of their views before any fundamental change was made in the Indian constitution. They had become increasingly conscious of the fact that with the new policy of high protection their subjects were being affected by increased cost of imported goods, with results unfavourable to the state revenue. They strongly disliked the idea of Indian defence and other questions being settled by a responsible government in India in which they had no part, and they were quite determined to refuse to accept the dictation of a responsible ministry in India. They were, on the contrary, most anxious as against the Crown itself to secure a definition in the narrowest terms of paramount power and to reverse the process of encroachment on their rights.

In pursuit of these views the princes secured a legal opinion by eminent counsel which exhibits unhappily singularly little

¹ Parl. Paper, Cmd. 3568, 3569; cf. 3700, 3712.

sense of constitutional law.¹ It was perfectly easy to prove that the terms of the treaties with the states had been often disregarded and were probably in no case fully respected. But to ignore the course of usage was absurd. The rulers had accepted the invasions on their technical rights as the condition of continued existence as independent entities, and to repudiate the means by which they had been able to live was inadmissible. The hollowness of the arguments used by the advisers of the princes was easily exposed by the Indian States Committee, but the unfortunate result of the advice given was seen in the demands which the princes were shortly to make as the price of their co-operation.

The actual recommendations of the Commission, which was not authorized to investigate the issue of the states as a factor in a possible federation, were treated at the time with complete dissatisfaction by Indian politicians and with little respect by the British Government. Moderate and prudent, they failed to please extremists and offended Conservative opinion in the United Kingdom as dangerously generous. Their solid value is proved by the fact that, though the report seemed to be discarded with indifference, much of its substance is embodied in the reform scheme. It was recommended that responsible government should be made real in the provinces. Dyarchy had not worked, and should be definitely laid aside. The matters generally comprised in the popular phrase 'law and order' should be placed under control of ministers. In a carefully reasoned argument it was shown that to deny these matters to the ministry was to negate responsible government and to perpetuate the worst features of dyarchy. Safeguards were no doubt necessary, but they must be supplied in part by the grant of special powers to the governor, in part by the maintenance of complete control of the Indian government. The existence of dyarchy in the central administration was absolutely negatived; there must be unity and freedom from domination by the legislature. The Commission, however, did not regard this position as intended to last indefinitely. It looked forward to the possibility of a federation² to include the states which would render it possible to reconsider the issue of

¹ Parl. Paper, Cmd. 3302, pp. 59-73.

² Cmd. 3569, pp. 193 ff.

responsibility, provided that arrangements could be made for defence which would facilitate transfer of authority. In sympathy with Indian ideals it suggested that the protection of India from external attack might be taken over by the British Government,¹ leaving to India the far less formidable, if difficult, task of maintaining forces sufficient to secure internal order. It was hoped that in this way a considerable reduction of cost might ensue, which would enable India to spend more on nation-building services. The suggestion, naturally, was open to many difficulties and was hastily ignored both in the United Kingdom and in India.

It was probably foolish of Indian opinion to repudiate the report out and out. If it had been accepted, the British Government could hardly have failed to work on it, and responsible government in the provinces would have been achieved much earlier than it could be under any later scheme. Moreover, the pressure of such governments on the centre would doubtless have operated strongly in the direction of inducing the British Government to aim at federation and the states to come to terms with Indian political leaders. It is noteworthy that the Commission endeavoured to suggest that responsible government in India need not follow rigidly existing models, a fact which at once rendered it suspect in the eyes of Indian politicians, whose views on these topics have throughout shown a remarkable lack of ingenuity and a determination slavishly to copy Western models hardly compatible with the national spirit by which they are animated.

3. THE ROUND TABLE CONFERENCE

(a) THE MOTIVES AND ASPIRATIONS OF THE PARTIES TO THE CONFERENCE

As against the calm wisdom of the Commission's report must be set the revolutionary violence by which the Congress under the scheme of civil disobedience endeavoured to destroy the prestige and power of the government of India. The movement for the manufacture of salt in defiance of the government

¹ Comd. 3569, pp. 173 ff. For the Government of India's criticism, see Comd. 3700, pp. 130 ff.

monopoly was skilful, for the monopoly was unpopular, and it was easy to insist that the unhappy peasants were compelled to pay an unjust tax on a prime necessity of life. But the government failed to take the matter sufficiently seriously and this attitude evoked violent attacks on governmental and other property and the assassination of officers, both British and Indian. A commercial boycott was called into being, and popular feeling was excited to picket liquor shops, with the inevitable result of struggles with the police. Agrarian unrest was excited in the United Provinces, disaffection on the frontier encouraged as well as rebellion in Burma. A most daring raid against the armoury at Chittagong secured arms for the malcontents, while towns like Peshawar and Sholapur for a time fell under the control of the mob. An ominous feature was the appearance in the North-West Frontier Province of a 'red shirt' movement under Abdul Ghafur Khan which claimed to support Congress views, but was also marked by a strong pan-Islamic feeling. The value of the aid of the Indian business world was soon seen. Their contributions enabled the payment of volunteers for the cause, their technical knowledge guided the boycott of banks and insurance, and terrified the British commercial community into willingness to make terms with Indian aspirations. Moreover, the boycott showed by its success that successful appeal was being made to the lower classes of the people who were losing respect for a government which failed lamentably to counter the movement in its inception.

Fortunately the widespread character of the disorder roused the government to assert its strength. The power of the governor-general to issue ordinances was invoked, and drastic measures¹ passed to counter the different features of the boycott. Many supporters of Congress including Mr. Gandhi were arrested, troops were placed in the more disturbed areas, and martial law applied locally.² The results were considerable. The prevalent idea that the government had abdicated its functions received a useful check, and the strength of the administration when it chose to exert it was revealed.

¹ The Press law was revived; the property of associations declared unlawful could be seized; intimidation by pickets, boycotting of public servants, and incitement to pay no rent or taxes became illegal; see Ordinance 10.

² Ordinances 4 and 8 (Sholapur and Peshawar).

But mere repression was no part of the governmental programme, for it set great store by the Conference which it had authorized the governor-general to invite to meet at London. The personnel collected was remarkable for the strength of the spokesmen of the states, who included Sir Akbar Hydari for Hyderabad and Sir Mirza Ismail from Mysore as well as the Maharaja of Bikaner. But every great interest in India save Congress was represented, and much unanimity prevailed on vital principles. The states were prepared for federation provided the federation was independent of British control, though for a transition period that independence might be modified by the existence of limitations. The motives for this attitude have been indicated above. It was felt that by such an attitude it would be possible to secure in framing the constitution a much stronger position for the states than mere numbers would give them, and that at the same time they would be able in non-federal matters to secure freedom from intervention by the Crown except on definite and agreed grounds. It was argued that British interference in the name of better government and satisfaction of the growing demand for some degree of control on the part of the people would become more and more insistent unless bounds could be set to paramountcy, which had been declared by Lord Reading to depend on the will of the Crown when the Nizam of Hyderabad had endeavoured to reopen the assignment of Berar by his father on the score that his consent had been virtually due to unfair pressure. The British Government was clearly being impelled towards responsible government in the provinces; it could not safely concede that if the central government remained autocratic, since the result would be a constant assault on the centre by the provinces relying on their position as exponents of the will of the people. It must therefore build up a Conservative central authority, and the states could serve that purpose and achieve their own ends, for the British Government would be prepared to pay a price. Hence throughout the long period of negotiation the states stood out clearly as seeking to attain the maximum advantage for themselves, and above all security from intervention in their domestic affairs by the federation or the Crown. No doubt many princes were also

moved by the ideal of a united India soon free from British dominion, and there is no ground to suppose that any of them were prepared for such an end to sacrifice anything of their internal autoeracy. They naturally believed in that system of rule; not even the Gaekwad of Baroda claimed to accept democracy in India as wise, and that being so their attitude was inevitable; it was their duty to their country and themselves to entrench as far as possible the principle of autoeracy.

British Indian politicians welcomed at first with enthusiasm the idea of making with the princes a common stand against British control. Many of the leaders were decidedly oligarchic or aristocratic and Conservative in their views, and they saw no objection to having in the representatives of the princes an assured strength of Conservatism to prevent any risk of democratic encroachments. It was only gradually that it came to be realized by the more advanced of moderate politicians that the princes were engaged essentially in the business of securing a definite position whence they could defy the introduction of any form of democracy in their dominions, and that they would act rather as a support for British control than as furthering Indian autonomy. Moreover, a further difficulty presented itself. The princes in the main were Hindu and their presence in the federation might well strengthen the Hindu as opposed to the Muslim element. From another point of view the objection was taken that Muslim rulers like the Nizam might well select Muslims as his spokesmen, so that Hindus would be misrepresented by Muslim nominees. Others again took exception to the status of representatives of the states, as bound to vote according to the dictates of the rulers as opposed to the representatives of provincial electorates. But the original feeling was one of readiness to co-operate as a means of replacing British control.

The British commercial community also favoured federation. Their motives were largely enlightened self-interest. They realized that concession to Indian demands for responsible government was inevitable in view of the attitude adopted by the Labour party, and they concluded that the best way in which to secure such safeguards as might be possible lay in

co-operating with moderate Indian opinion. They were therefore not concerned with the wider question of the proper form of government for India, a subject on which they were not well qualified to judge, since they had little contact with the issue of government outside the commercial centres. But they did realize that the Congress movement was backed by a strong nationalist economic policy on the part of Indian manufacturers and merchants, and they knew that a mere attitude of opposition would merely result in the utter disregard of their interests. Nor, it must be remembered, were they necessarily interested in the development of the control of British manufactures; they were in part interested in other countries' export trade, and this fact explains the comparative indifference shown by them to all attempts to secure opportunities for British exports. Moreover, they had been convinced by experience of the danger of the boycott, and they believed, whether rightly or wrongly, that it was less likely to be used as a weapon if they appeared in Indian eyes as favouring reform.

The Labour government in the United Kingdom was in control during the early stages of the Conference, and unquestionably it was largely affected by the doctrine that democracy was essentially justifiable and could not properly be withheld from the Indian people. The rank and file of the party were also under the impression that the reforms contemplated conferring on the workers of India control of the government, and thus would replace capitalism by workers' control. Only gradually did it come to be realized that the proposals which would emerge from any Conference could never be successful in according any control to workers, and that any scheme must place the power in the hands of a middle-class intelligentsia and the Conservative retainers of the Indian princes. It was then impossible for the party to do more than reiterate its conviction that India should have a constitution far more generous in concession than that proposed. But throughout every effort was made to ignore the salient fact that the project meant sacrificing any power that still existed of preserving the interests of the lower classes. Occasional use was made of the argument that the grant of responsible government opened the way for the masses of India to secure power

of controlling their own destinies. But it was ignored that the structure of the constitution presented no means by which the classes whom it enfranchised, and the intelligentsia to which it accorded power, could be forced to surrender any share of authority to the lower orders of the people, and that, on the contrary, it entrenched them in an unassailable position fortified by the knowledge that any revolutionary efforts to overthrow their rule, should such happen, would be destroyed by the British forces.

The Conservative opposition¹ to the proposals was open to attack on many specious grounds. It was urged that it was based on old-fashioned ideals of domination, expressed by retired officers who could see no good in change. This view was reinforced by insistence on the fact that the reforms were accepted by the heads of the provincial governments and members of the governor-general's council, a contention which deliberately ignored the obvious fact that after 1919 it would have been absurd for the British Government to entrust high office to men who were not genuinely in favour of the reform movement. That such men should remain adherents to it was only to be expected; critics naturally either retired prematurely or on completion of service without achieving the highest offices. Again the opposition was charged with the desire to exploit India for the benefit of British trade, and no credence was accorded to their contention that extreme protection in India was working hardship on the consumer, a fact which was candidly admitted in 1935 by the member of council in charge of finance, though he confessed that revenue considerations precluded the serious reduction of tariff rates. The opposition stressed also, quite fairly, the fact that India owed much to British protection, and that some favour in trade would have been not inconsistent with imperial history. Canada when she gave her early preferences recognized that in this way she was paying her debt for British defence. It pointed out also the grave danger of the removal of British control over sectarian vehemence, a view sadly strengthened by the deplorable bitterness which was to be shown at Cawnpore and Karachi between Hindus and Muslims, now actuated by the

¹ Cf. Sir R. Craddock, *Asiatic Review*, 1935, pp. 217 ff.

hope or fear of political domination. It contended that the vast mass of the people of India was wholly unused to democratic ideas and only desired effective and impartial government, which would disappear in the introduction of responsible government under the quite unsuitable conditions of India. In the course of the discussions the failure of democracy in most lands was naturally stressed as an argument against its extension to India, and great importance was attached to the attitude of Congress which asserted the right of India to full independence, while even more moderate men spoke of drastic revision of the burden of the Indian debt and the transfer of such part of it as represented wars of aggression to British shoulders. The utter inconsistency of yoking British India with the autocracy of the states was adduced, and great stress came to be placed on the danger of anarchy, once the police force fell under ministerial control, with the resulting danger that it would fail to act impartially as between Hindu and Muslim. To this argument stress was lent by the constant manifestation of anarchic movements in Bengal, which proved extremely difficult to counter, and which showed in what constant danger lived the men who were engaged in combating this menace.¹ It was not very difficult to adduce evidence of deterioration of public services under ministerial control; in fact, the desire to give local government institutions free room to develop had resulted in an unwise relaxation of central control, and in inefficiency and increased cost.

At the first session of the conference it was clear that, while the general principle of federation was accepted, there would be grave difficulty in arranging the details, for each great interest was determined to secure the maximum of concessions as the price of co-operation. The principle of democracy as understood in the Dominions, the rule of the majority, could not be accepted by the Muslims nor any other of the great minorities represented at the Conference. Nor were the Hindus themselves united in demanding orthodox democracy, for the depressed classes among them felt much apprehension lest the new constitution should place them helplessly in the hands of

¹ See Bengal Administration Report, 1933-4, p. xxxii; H.C. Paper 5 of 1933-4, ii, 391 ff.

the brahmans and other higher castes. In addition to safeguards for minorities, it was necessary to provide safeguards to ensure India against external and internal instability. The most enthusiastic Indian politician in his moments of cool reflection was bound to admit that his country was not yet prepared to maintain itself against external attack, and that apart from danger from a great power, the masses of tribesmen on the north-west frontier and the possibility of Afghan co-operation rendered a powerful defence force essential. To make that force Indian would be a long business, and politicians could not overlook the danger that the force once created might use its strength to establish the control of those classes who belong to martial races and enlist in and become officers of the Indian Army. There was also deep anxiety regarding the maintenance of internal order, for the time being secured by the use of British troops completely free from any racial or communal bias. But the maintenance of British forces must mean the reduction of the measure of responsible government, for the British Government plainly could not surrender to an Indian legislature and a ministry dependent upon it the control over the British troops. This position involved at once financial consequences of the gravest kind, for the cost of the army¹ was bound to absorb the major portion of the available revenue, and the necessity of providing funds to meet it must mean the direction along certain lines of both taxation and currency policies. Not less important was the question of security for loans. These had been regularly raised in England by the secretary of state in council, and nothing had been done, as was done in the case of Dominion loans,² to make it clear to lenders that they must look to Indian revenues alone for reimbursement. After all, in the days of the Company, lenders of money had looked to reimbursement by the Company without thinking of the source of its revenues, and naturally it was assumed by lenders that the British Government must so order Indian policy that there could be no chance of default. Moreover, apart from this strong moral argument, there was the fact that it would be disastrous to British credit in general if

¹ 46·20 crores in 1933-4 out of 77·91 crores, the revenue being 78·16.

² Keith, *Letters on Imperial Relations*, 1916-35, pp. 227, 228.

any part of the Empire were allowed to default. It was remembered that pressure had been successfully brought to bear on the Commonwealth of Australia to undo the damage done by the default of New South Wales, and this precedent was strengthened in 1934 by the terms given to Newfoundland¹ rather than risk the effects of a default there. Plainly it would be necessary to control finance to such an extent as to secure payment of the army and of the interest on the public debt.

Protection was also necessary for British commercial interests, whether those of manufacturers who had found entry into India for their goods hampered by high tariffs and more gravely still by boycott, or those of the British mercantile community and financial interests. They had reaped large profits from India, but they had also conferred upon it great benefits, and had inspired Indian firms to rivalry and the desire to make use of political power to make good their handicaps in the competition for business. It was essential also to safeguard the position of civil servants. The lower posts had already largely passed into Indian hands, the education service had been Indianized perhaps too completely and hastily for its own good, and there remain mainly the Indian Civil Service, the Indian Police, and the civil side of the Indian Medical Service, with irrigation engineering as open to systematic European recruitment side by side with Indian. The members of these services must be protected in the enjoyment of their rights, but it was also necessary to secure the continuance of the British recruitment for the services for the period of transition.

Hindu-Muslim rivalry added enormously to the difficulties of the situation, for the Muslims were not willing to contemplate the creation of the strong central government desired by the Hindus, to exercise financial and general control over the provinces, since it was clear that in the centre there must be a Hindu majority. Moreover, the Muslims realized and freely used the tactical advantage to be derived from refusing to take any serious part in discussing the powers to be accorded the central government until they had secured a decision in their favour on the question of the composition of the legislatures.

¹ Keith, *Journ. Comp. Leg.*, xvi, 25 ff.

They had early seen the advantage which would accrue if they could have in as many provinces as possible Muslim majorities, so that in the other provinces anti-Muslim propaganda might be held in check by fear of reprisals. It was a rather ingenious plan, and resulted in the steady pressure put on the government to concede the erection of the North-West Frontier Province into the status of a governor's province with the usual legislature and dyarchy, a result achieved in 1932, and to create a new predominantly Muslim province by separating Sind from Bombay, a connexion admittedly historical and artificial, though it was defended on the score that Sind gained greatly from expenditure on it at the expense of Bombay.

(b) THE FIRST SESSION OF THE CONFERENCE

The result of the first session of the Conference¹ established the exemption from ministerial control of the issues of external relations and defence. The latter issue necessarily evoked serious reserves from Indian delegates, and various plans were mooted by which the governor-general might be brought into close touch with Indian opinion in his conduct of defence policy. It was suggested, for instance, that his adviser for defence should always be an Indian chosen from the elected members of the Assembly. It was common ground that every effort must be made to interest Indian legislators in defence matters and to obtain helpful co-operation in the difficult task of preserving the security of India while training an Indian army. It followed therefore that the governor-general must have a special responsibility for financial stability, seeing that he was responsible for defence which controlled the financial position, but that the governors need not be required to act in this sense. It was also agreed that governor-general and governors must co-operate in protecting minorities, and that the position of the civil service must be safeguarded. On commercial discrimination a way out seemed possible on the basis of an agreement between India and the United Kingdom on a basis of reciprocity;² as the United Kingdom was wont to

¹ Parl. Papers, Cmd. 3778, 3972.

² For a draft see Keith, *Letters on Imperial Relations*, 1916-35, pp. 234-44.

accord complete equality of treatment to Indians, the same treatment might properly be granted in return. Further, it was agreed that the governor-general and governor must be given the widest power of independent action in case of emergency and to prevent the breakdown of government. It was endeavoured on the part of the British delegates to make out that such safeguards were part of every British constitution, but this clearly was an over-statement and it had little effect beyond confusing the issue, and also commentators on it. The obvious truth was that India presented problems *sui generis* and that the safeguards were novel, because they were planned to meet new conditions and must stand or fall on their own merit.

Burma, it was agreed, might well be severed from India, as advised on geographical, ethical, religious, and social grounds by the Simon Commission.

The accord achieved, defective as it was, represented the consensus only of a minority of politically minded Indians, for Congress was hostile and derided the claims of the Indian delegates to bind India. Hence Lord Irwin decided to seek accommodation with Mr. Gandhi as the dominating figure in Congress. The civil disobedience movement was ruining the trade of the towns, it pressed heavily on finance, and it strained the police organization and the jails to the utmost, besides adding gravely to the almost intolerable burden of civil administration. On the other hand, Mr. Gandhi probably felt that an opportunity was at last afforded to strike an effective blow for his side in a positive effort at construction. At any rate, the accord of March 1931 put an end to civil disobedience, though it permitted peaceful picketing in support of a campaign in favour of purchase of Indian products, and released those political prisoners who had not been found guilty of violent crimes. The temporary ordinances most objected to were to be recalled, and in return Congress was to take part in the next session of the Conference. It must be admitted that the pact was a distinct triumph for the governor-general, though it might also be held to be a signal tribute to the power of an Indian leader to secure a formal agreement with a government as to its political conduct. But the fatal mistake was made of sending Mr. Gandhi as the solitary spokesman of Congress to

England, for he obviously represented only one of its many aspects and in social and economic views he differed very seriously from many of his ardent followers on political issues.¹ Moreover, the Congress meeting at Karachi was agitated by fruitless efforts to save from execution the Sikh Bhagat Singh condemned to death for the murder of Mr. Saunders, and the efforts of Congress volunteers to enforce a hartal on Muslim shopkeepers resulted in a disgraceful massacre at Cawnpore² which was terminated only by military efforts.

(c) THE SECOND SESSION OF THE CONFERENCE

The proceedings (September 7th–December 1st 1931) of the second session of the Conference were unhappily rendered from the start unfruitful by the attitude adopted by Mr. Gandhi in claiming that he spoke for the people of India as a whole and in denying the representative character of the spokesmen of the minorities.³ In any case the Conference was held under conditions unfavourable to dispassionate consideration of Indian issues. The financial and economic crisis of 1931 had driven the Prime Minister to secure retention of office at the expense of a coalition which resulted in the definite repudiation of their leader by the vast majority of Labour politicians and most of the Labour electorate. Naturally it was widely thought that the change of government might induce a change of view on the part of the ministry. But Mr. MacDonald was able to secure from the rejection of his cherished tenets certain principles, including the continuation of his Indian policy without much change. An effort was made to suggest that it might be well to consider provincial autonomy apart from the creation of the federal structure, but this was unanimously repudiated by the Indian delegates and the suggestion was not pressed. There were hopes that it might be possible to secure through Mr. Gandhi accord on the vexed question of communal representation, but here again failure was recorded, for Mr. Gandhi probably realized that his popularity was on the wane

¹ Bose, *The Indian Struggle*, pp. 247–61.

² Parl. Paper, Cmd. 3891.

³ Parl. Paper, Cmd. 3997; British India had sixty-five representatives, the states twenty-two, the British parties twenty. For Burma a separate Conference sat from November 27th 1931 to January 12th 1932, Cmd. 4004.

and that any concession made by him would be resented by his followers in India. On the other hand, the minority representatives got together and planned a scheme of safeguards for themselves which went a good deal beyond anything reasonably likely to be accepted. Ultimately it became patent that nothing could be expected from agreement in the way of the disposal of the communal issue, and that if progress was to be made the British Government must act.

The chief result of the change of government was probably the complete change of attitude on the part of the government of India under Lord Willingdon. The return of Mr. Gandhi found just cause for action afforded to the government by the action of Abdul Ghafur Khan and his followers in the North-West Frontier Province, and the decision was taken to strike at the activities of Congress by declaring its operations illegal, while Mr. Gandhi was again imprisoned. The weapons of preventive arrest and sequestration of property of any illegal organization were resorted to, and met with much success. It was natural that the propaganda of Congress could not be kept up indefinitely. The hartals ceased to be exciting and shopkeepers began to count the cost in loss of trade; the no-rent campaigns among the peasantry ceased to satisfy when their political purpose was realized by the peasants, who saw little prospect of gaining anything. Indian industrialists were not willing to risk further sums on an illegal organization, and the minorities could not forgive Mr. Gandhi for his effort to speak for them in London. Moreover, within the party there were serious difficulties due in part to rivalries such as that of Mr. Subash Chandra Bose and Mr. Sen Gupta in Bengal, and in part to the growth within the party of a wing which was decidedly communistic in outlook and had little sympathy with the Mahatma's muddled idealism. The result was that the restoration of the effective authority of the government was rapid. The fact that interned persons could safely be released was shown by the decline in the number of those detained for civil disobedience from 34,458 in April 1932 to 4,683 in July 1933. The reassertion of governmental authority¹ was plainly

¹ For measures in Bengal against terrorism cf. Boso, *The Indian Struggle*, pp. 334-40.

a necessary preliminary to any effective progress with the difficult work of reform. At the same time the ground for advance was thoroughly explored by a committee which investigated on the spot the crucial issue of the franchise, while another committee devoted its attention to the financial claims of the Indian states. The report of the franchise committee was followed by the announcement of the government's decision of the communal issue.¹ It was naturally based on the large measure of agreement already achieved, which explains why it proved difficult to induce general resistance to its terms. But Mr. Gandhi was deeply moved at the idea that the depressed classes should be treated as distinct for voting purposes instead of being included in the general constituencies. The result was that he forced the hands of the leaders of these classes, Dr. Ambedkar in particular, and secured a pact² which was of manifest material advantage to the depressed classes, and doubtless of spiritual advantage to Mr. Gandhi. The number of seats allocated to these classes was to be increased at the expense of the general body of Hindus, but the depressed classes were to vote in general constituencies. But they were separately to select four times as many candidates as there were seats to be filled by representatives of these classes, so that no person might be chosen to fill one of these seats who was not acceptable to the classes concerned. The net result unquestionably has been to penalize the higher-caste Hindus, who had allowed themselves to be outmanœuvred and who had thrown overboard the principle of due regard to numbers in allocating seats by their support for tactical reasons of the demands of the Sikhs of the Punjab for recognition far beyond their numerical rights. The other point of chief interest in the franchise proposals of the committee was their failure to find any workable form of direct election which would enable villagers to have a say. The administrative difficulties were found to be too great, and eventually the committee had to be content with enfranchising as they judged about 27 per cent of the people for provincial elections, while for elections to the federal Assembly some seven or eight million voters might be provided.³

¹ Parl. Paper, Cmd. 4147 (August 4th 1932).

² Poona Pact, September 24th 1932. ³ Parl. Paper, Cmd. 4238, pp. 25, 26.

(d) THE THIRD SESSION OF THE CONFERENCE

There followed a third session¹ of the Conference (November 17th–December 24th 1932), which was convened rather reluctantly by the British Government, for it had hoped that all that remained to be done in the way of consultation might be carried out in India. The character of this session was marked by the cessation of Labour co-operation in the Conference, thus introducing a definitely party element into the proceedings, and by the absence of any spokesman of Congress, a fact which helped to accelerate the proceedings. It now remained for the government to accept responsibility for definite proposals to effect the carrying into law of the measure of accord achieved by the Conference, together with such further issues as must be decided to complete the scheme. This took the form in March 1933² of a set of proposals for reform which were to be submitted to a joint select committee of Parliament for examination and report. The White Paper was on the whole a very fair reproduction of the results achieved, but it is quite fair to say that it was rather definitely drawn up in order to placate the volume of Conservative criticism which had been steadily growing ever since the conclusion of the first session of the Conference. General approval of the policy then arrived at had been accorded by the Liberal and the Conservative parties, but on this head Mr. Churchill had separated himself in 1931 from the group of ex-ministers who formed Mr. Baldwin's shadow cabinet, and ever since then had led the revolt against concessions.

(e) THE REPORT OF THE JOINT SELECT COMMITTEE

The proceedings of the Joint Select Committee³ suffered from the limitation of its membership. It was contended by the opponents of the scheme, with some degree of justification, that the constitution of the committee was too definitely marked by

¹ Parl. Paper, Cmd. 4238.

² Parl. Paper, Cmd. 4268. Despite the indecisive result of the Burmese election of 1932 on the issue of separation, its advantages clearly outweighed the objections in the view of the government.

³ H.C. Paper 5 of 1933–4; H.C. 112 of 1933.

approval of the governmental policy and that a more impartial body should have been set up. As a result Mr. Churchill and Lord Lloyd declined to serve upon it and thus allowed their chance of improving the proposals to go by default. The committee, however, had a measure of assistance from a select body of Indian representatives, who took part in its proceedings somewhat in the attitude of assessors, and who presented to it an expression of their views on the position. The most interesting feature of the proceedings was the attitude adopted on several points by the Labour members of the committee. They accepted as inevitable the main outlines of the scheme, and regretfully confessed that there was no real chance of the workers, agrarian or industrial, controlling for a prolonged period the legislatures, though they would have widened the franchise substantially. But they objected to the proposal to constitute the federal legislature of two houses, on the ground *inter alia* that the legislature was in any case too large for all the work it could have to do, and that there was much danger of its seeking to interfere in issues which were really provincial. Exception was also taken to the reservation of foreign affairs in the hands of the governor-general. It was held to be only fair that India should be entitled to define her own attitude on external issues, especially as that attitude would largely determine the cost of defence. Further, it was urged that Indianization of the forces should be arranged for at a definite date, on the ground that the military authorities if given this task would succeed in bringing it to a satisfactory conclusion, but that, if the matter were left undefined, there might be serious delay in its accomplishment. It was also argued that control over finance should be left to the Indian government, which could not be free without such control; responsibility could be learned only by exercising it. Safeguards in general were deprecated with an exception for such only as Indians demanded through distrust of one another. Commercial safeguards in special were perfectly futile, for India was thoroughly conversant with the art of political boycott. Even in the case of defence there should be a statutory committee of the legislature which from the first should be kept in touch with defence problems.

In essence the majority of the committee accepted the governmental proposals, but emphasized still more the necessity of safeguards as a result of the evidence given to them on behalf of the civil service and the police, and perhaps still more because of the facts laid before them by the government itself regarding the prevalence of anarchical conspiracy in Bengal which had distinguished itself by political assassination, young women being dragged into the contest. None the less the committee rejected suggestions of reserving law and order, and accepted the contentions of the Simon Commission on this head. The fundamental argument was simply that the sense of responsibility must be destroyed by the functioning of government in watertight compartments separated under the constitution, and that friction between the parts of a government so divided was inevitable. On a like ground the committee rejected the view that there could be an irresponsible federal government side by side with responsible ministries in the provinces. Provincial ministers would constantly be able to disclaim responsibility on the score that the economic policy and the finance of the central government precluded their carrying out their programmes of social betterment. It was naturally admitted that the reservation of foreign affairs and defence did create dyarchy within the central government, but it was pointed out that these departments had normally few points of contact with other fields of central administration under the new constitution. It was necessarily admitted that control over the army involved a certain measure of control over railway and road communication, but the importance of that might be minimized. Perhaps insufficient attention was paid to the fundamental fact that the demands of defence on revenue really must determine the economic and financial policy of any government in very large measure, and that to assert that a responsible government was possible when it must devote most of the revenue it raised to purposes over which it had no control was to treat responsible government in a rather curious manner. Nor was sufficient stress laid on the fact that the federal legislature must tend to devote its attention to securing control over issues which so deeply affected its powers as those of defence and external relations. The decisive factor,

however, was the absolute determination of the princes not to accept federation without responsibility. The difficulty caused by the inability of the princes to accept the full list of subjects which could be made central as federal raised much discussion. It was felt to be impossible to surrender the chance of legislating for all the provinces in certain important issues, and the best conclusion that could be arrived at was that a convention might suitably be developed under which the representatives of the states would not vote on central questions, though the possibility of providing for this by any legal provision was ruled out.

(f) THE GOVERNMENT OF INDIA BILL IN PARLIAMENT

The passage of the Bill through the House of Commons resulted in certain changes of considerable, though not primary, importance. The position of the states raised serious objections on the part of the princes, who were most anxious to maintain that their acceptance of federation must not be treated as if they were subject to the legislative authority of Parliament.¹ The sixth clause of the Bill as introduced provided that a ruler must accept the Act as applicable to himself and his subjects, specifying in his instrument of accession the subjects on which the federation was to have power to legislate for the state and specifying any condition to which his accession was to be subject. The princes seem to have desired to establish the point that the Act should be in force in each state solely by authority of the instrument of accession. Obviously, if there were any substance in the view of the princes, it was impossible to give effect to it, and the position was dealt with merely by verbal changes, and the clause as altered provides that a ruler 'accedes to the federation as established by this Act' instead of accepting the Act. It may be doubted if the position of the princes is in any way improved by the change of phrase. In a number of other points of minor importance concessions were made as regards wording, and in one major provision. The original proposal regarding the possibility of a breakdown of the constitution had provided for the indefinite

¹ Parl. Papers, Cmd. 4843, 4903 (1935)

suspension of the constitution by the authority of the British Government. It was now made clear that any suspension could not last beyond three years without parliamentary legislation being undertaken. On the other hand, the government declined to accept the suggestion that in the case of suspension any state should have the right to secede from the federation, and it equally declined to undertake to define and limit its paramount powers as an inducement to the states to accept federation. Such inducements as are offered therefore are chiefly financial, and the possible grant of full control over such civil stations as Bangalore in the case of Mysore. It was, however, made clear in the case of Tangasseri that no transfer to Travancore could be carried out against the wishes of the people.

As regards the federal executive the chief change made was in respect of the special responsibilities of the government generally towards the services. These were made to extend to persons who had been in the government service and to the dependents of officials and ex-officials, thus placing beyond doubt the position of the governor-general in respect of pensions and family pensions. For the purpose of further assurance of rights in these matters the obligation of the central and provincial governments to provide the secretary of state with sufficient funds to meet liabilities due was extended to include specifically pension liabilities. The responsibility of the secretary of state for the payment of pensions due outside India was explicitly recognized, and the right to sue the secretary of state in respect of pension liabilities was preserved. It was claimed on behalf of the pensioners that express power to pay out of British funds should be included in the Act, but this was refused, as was also the much more reasonable claim for a formal guarantee. The arguments of the government were far from happy; it was contended that a guarantee was unnecessary, but clearly if it removed anxieties it would have served a useful purpose. It was further urged that it was undesirable as it would enable an Indian government to use a refusal to pay pensions as a means of pressure on the British Government in the knowledge that the pensioners would not suffer. It is ludicrous to suppose that such knowledge would affect in any way the action of an Indian government, and the

doubts of pensioners were not wholly removed by the argument that it would be the duty of the secretary of state to instruct the governor-general to raise necessary funds by taxation or to issue a loan in order to pay pensions.¹ The difficulty obviously is that Indian finance may be so disintegrated that pensions cannot be paid without taking away funds necessary for current business, and in such an event the fate of pensions is obvious. Clearly the new security is much inferior to the old, and attempts to hold that under the former regime the British Government was not ultimately bound to obtain funds from Parliament if need be to meet pensions were wholly unconvincing.

The essential provisions regarding the federal legislature passed without substantial change. The Liberal opposition contended strongly, in harmony with the views of the government of India² and of Indian politicians, in favour of the direct election of members by the Assembly by territorial constituencies. The chief arguments against this project were based on the impossibility of any real contact between the electorate and the member when constituencies must be so large, and the advantage to be derived from securing close contact between those responsible for provincial legislation and the federal Parliament.

The provincial executive was accepted by the Commons without serious change. The chief anxiety expressed by the opposition turned on the control of terrorism, of communism, of the no-rent campaign, and of civil disobedience; but the government insisted that the provisions inserted in the Bill which added to the special responsibilities of the governor the duty of supervision of police regulations, and of combating attempts to overthrow the government were adequate for the ends desired. One substantial change only was made and that affected the provincial legislatures. Assam was given a second chamber as a further concession to the conservative character of the whole scheme. The franchise for the lower chambers was definitely made part of the Bill by being embodied in a schedule, and it is a sign of the care with which the Act was

¹ Lord Zetland to Lord Rankeillour, July 16th 1935.

² Cf. Parl. Paper, Cmd. 3700, pp. 114 ff.

passed that the terms of the schedule were carefully scrutinized in committee. Efforts were made by the Labour party to extend the franchise, but the government naturally enough resisted firmly this project, on the score that the report of the franchise committee showed the administrative impossibility of any wider franchise. Only minor amendments thus could be made, including the grant of the vote to retired officers and men of the Indian police on the same conditions as to officers and men of the army. The electorate was calculated at 35,000,000, 14 per cent of the population, 27 per cent of the male population, and 43 per cent of the adult male population. In the case of females the Commons adopted the changes proposed by the joint select committee. The proposals of the franchise committee were estimated to enfranchise women in the proportion of $1 : 4\frac{1}{2}$ to men. The White Paper reduced that to $1 : 7$ by requiring women who were qualified in respect of their husbands' property holdings to claim registration and by imposing a higher educational test. The select committee recommended that the necessity of application might be removed in certain provinces and areas, and that in certain provinces the educational test should be lower, thus increasing the proportion to $1 : 5$, subject to reduction if the requirement of application, where retained, proved to discourage enrolments. These views were given effect in the Commons, and the government there promised to provide facilities in the Bill for the removal before the second election of the application test in those cases where it was retained at first, except where social conditions would make such rapid progress dangerous.

A further concession to women was made in the undertaking to reserve for them six seats on the Council of State, to which they might otherwise never attain entry, and in the declaration that a person shall not be disqualified by sex from being appointed by the Crown to any civil post under the Crown in India, but with due power to the secretary of state, the governor-general, and the governors to make exceptions to this principle.

The question of legislative power in the federation and the provinces resulted in no serious change. The provisions regarding the prevention of discrimination against British trade

were much debated, but it was accepted that legislative discrimination must be directly prohibited in the constitution by enactment, thus accepting the plan which the British community had proposed without acceptance to the Simon Commission. But at the same time the compromise of the select committee was included, under which the restrictive clauses of the constitution may be held in abeyance by Order in Council if a convention covering the issues is successfully negotiated with the new Indian government. The wording of the restrictive clauses was made more extensive, but was not extended to executive discrimination, which was left a special responsibility of governor-general and governors. Moreover, the government definitely refused to accept the proposal to forbid the imposition of penal duties on United Kingdom exports, insisting that this would needlessly limit Indian authority.

The government made further concessions in the matter of excluded and partially excluded areas, which it had proposed to define in a brief schedule. It was pointed out that the issue was one of great importance in the interests of the backward tribes. Excluded areas would be administered at the governor's discretion, in partially excluded areas he would be responsible for protecting the interests of the aborigines, and it was therefore desirable, especially as the Act had provision only for transforming an excluded into a partially excluded area and for merging a partially excluded area into a province, to mark out as many areas as possible for such protection. The weight of the contention was serious, and the governmental argument that it was difficult to delimit areas owing to the scattered condition of the aboriginal tribes, and that assimilation was to be aimed at, failed to carry much conviction. Finally it was decided to accept neither the government's brief schedule nor the longer one proposed in lieu, but to determine the areas by Order in Council based on a White Paper, giving the relevant facts, to be laid before the Houses.

A rather bitter controversy was waged over the question of the desire of the Labour and Liberal parties to include in the Bill a definite reference to Dominion status as the goal of Indian government. The government adopted a curious attitude. It definitely accepted the pledge contained in the

preamble of the Act of 1919 of the gradual development of self-governing institutions with a view to the progressive realization of responsible government in British India as an integral part of the Empire, and the interpretation put thereon by the governor-general in 1929 with the authority of the government of the day: 'The natural issue of India's progress as there contemplated is the attainment of Dominion status.' But it refused to put anything of this kind in a preamble, and instead insisted on preserving the preamble to the Act of 1919, when repealing that measure under the new Act. The preservation of the smile of the Cheshire cat after its disappearance was justly adduced by critics as the best parallel to this legislative monstrosity, and the omission of any reference to Dominion status, following on the complete silence of the joint committee, inevitably caused a painful feeling in India, and annoyance to those supporters of the ministry who realized that its action was certain to be interpreted in India as in some way seeking to evade frank acceptance of Dominion status as the final goal.

In the House of Lords the reception accorded to the Bill was naturally even more conservative than in the Commons, though the principle of the measure was definitely homologated and any idea of serious change was ruled out. But only one vital change was made with the assent of the government. The election of the British Indian members of the Council of State was transferred from the upper chambers of the provinces, where these existed, and special electoral bodies to be created, to the direct election in electorates with a high franchise to be delimited subsequent to the passing of the Act and approved by Order in Council submitted to Parliament.¹ It was difficult to find any logical justification for the change, and in the Commons Sir A. Chamberlain justly criticized the plan by which an Upper House was given a direct connexion with the people denied to the Lower House, and made indissoluble. The only excuse that could be adduced for the change was that it in a faint manner served to conciliate the Liberal opposition, which pressed for the adoption of direct election to the Assembly, and in fact it was accepted by that section of opinion, presumably

¹ 25 & 26 Geo. V, c. 42, s. 18 and Sched. 1.

because it must involve at no distant date direct election for the Assembly in order to remove an absurd anomaly. By an unkind fate the under-secretary who a short time before had proved unexceptionably that direct election for the Council was out of the question had to prove equally effectively that it was desirable. Unfortunately less than thirty private members took the trouble to attend the debate on this issue, perhaps because it was felt difficult to defend the *volte-face*, and Lord Eustace Percy could only plead that anomalies were an inevitable part of the new framework.

Other amendments were of minor importance. The governor-general and the governors were specifically encouraged to send messages to the legislatures to indicate their views on pending Bills¹ affecting their responsibilities. The previous sanction of the governor-general was made necessary for the introduction of any Bill varying the Indian side of the arrangement regarding relief from double income tax. The power of the Indian legislature was restricted by forbidding it to affect the right of the Crown in Council to grant special leave to hear appeals from the decision of courts in India except as specially authorized in the Act, thus extending a clause originally referring to criminal appeals. The rights of the Anglo-Indian community in respect of appointments in the post and telegraphs and railways departments were specifically recognized, and in the Commons the customs department was added to those specified. The necessity of the approval of the governor acting in his discretion or the governor-general to the leave of absence as well as the promotion of any officer appointed by the secretary of state was laid down.

It was decided that the secretary of state, the governor-general, and the governors should be given complete immunity from the jurisdiction of Indian courts during their term of office, including any process such as summons as a witness. When no longer in office the same immunity will apply as regards official acts save by special permission of the King in Council. But proceedings in England are not affected. It was also provided that during the transitional period before federation certain powers of the governor-general should be available.

¹ Ss. 20 (2), 63 (2).

On one point the government found the House of Lords especially anxious. The proposal to refuse power to the Indian legislature to penalize British imports was renewed, and ultimately a clause was moved to secure for British imports most favoured nation treatment. A very strong case could be made out for this concession, Canada having just reaffirmed her belief in this principle by extending not only to the United Kingdom but to South Africa, Australia, and New Zealand the benefit of her latest concessions to foreign powers. But the government refused to alter its standpoint that compulsion was inadmissible and was sustained by a small majority. Lord Derby voting in the minority, despite a faithful support of the Bill, which had led to his using his influence to secure the withdrawal of certain evidence originally proposed to be placed before the joint committee on behalf of the cotton industry, a procedure ultimately producing a change of standing orders as to witnesses destined to prevent a repetition of similar action.¹

For convenience the Act was directed by the Government of India (Reprinting) Act, passed on December 20th 1935 to be reissued as the Government of India Act, 1935, and the Government of Burma Act, 1935.

As the result of the report on Indian finances² by Sir O. Niemeyer, the government decided that it would be possible to inaugurate provincial autonomy under the Act on April 1, 1937, leaving federation to follow later.

¹ H.C. Paper 84 of 1934-5, May 9th 1935.

² Parl. Paper, Cmd. 5163 (1936).

CHAPTER X

FEDERALISM AND RESPONSIBLE GOVERNMENT UNDER THE GOVERNMENT OF INDIA ACT 1935

1. THE SALIENT CHARACTERISTICS OF THE FEDERATION

MUCH learning was displayed in the course of the discussion of the federation in the adduction of suggestions for guidance from other federal constitutions, but the essential principles of the new federation were obviously derived from those in operation in Canada and Australia, both of which Dominions owed much to federalism in the United States. Continental models furnished little that could be adopted, for the problem was new. None of the units to be federated had international status of any kind *inter se*, but on the one hand the provinces had been under the strict control of the central government and were now to be accorded a wider autonomy, while on the other the states had definitely to accept the restrictions of a federal system in place of a vague and varying measure of control by the Crown.

The federation exhibits all the normal characteristics of federal government.¹ There is a rigid constitution, with a very elaborate distinction of federal and local powers, and a federal court whose duty it is to secure the due observance of the limits placed on the centre and the local governments and legislatures. The constitution is written, and amendment is definitely and narrowly restricted. But the special circumstances of India result in many variations between the Indian constitution and those of Canada and Australia. On the other hand, it is truly federal, and therefore it differs essentially from the constitution of the Union of South Africa, which, under a semblance of federalism due to historical causes, is essentially unitary.

In Canada and in Australia federation was formed by the

¹ Keith, *Responsible Government in the Dominions* (1928), Pt. IV; *The Constitutional Law of the British Dominions* (1933).

agreement of colonies, each self-governing, to unite for certain purposes of common interest, while retaining in less degree in Canada, in greater in Australia, their original authority in matters not given to the federation. In India the provinces were not self-governing, and were already united under the control of a central government with plenary powers, the provinces thus being in law wholly subordinate divisions of a unitary state. The federation in their case confers on them an autonomy which they never before possessed, and gives it a legal basis. The provinces at the same time suffer diminution of functions and power in certain respects, for federal matters are now separated from provincial questions and taken away from provincial authority, which was unnecessary under the earlier regime when central control rendered provincial action with central approval legitimate in any field. A second element of the federation is afforded by the states, which do surrender definitely a considerable measure of their former authority, and thus conform closely to the normal federal type. This combination of wholly disparate elements gives a unique character to the federation and produces certain abnormal features. Thus, while the provinces are subject to a single system applicable to all, the states are definitely exempt from the application of a number of federal powers of legislation, unless they expressly accept them, which is not expected to be the case. In the same way the executive authority of the federation is uniform in regard to the provinces, but it may vary as regards the states. Moreover, both as regards federal legislative and executive authority, there may be variations between states, though naturally a certain uniformity is intended. The states again differ from the provinces in the essential fact that in each case adhesion is voluntary, while the provinces have federation imposed from above.

The division of powers in Canada rests on the assignment to federation and provinces of defined spheres, the very limited grant of concurrent powers on agriculture and immigration to both, federal legislation being paramount, and the grant of all residuary power to the federation. In course of legal interpretation the sphere of provincial power has been extended beyond the intentions of the fathers of federation, and the

importance of the residuary power was until recently minimized by the courts. In Australia the federation has a few exclusive powers, and a large number of concurrent but paramount powers, while all power not expressly or by necessary implication made federal exclusively can be exercised by the states, subject to being overridden by federal legislation. In India the attempt has been made very elaborately to assign power to the federation and to the units by enumeration of subjects, while a wide sphere may be regulated by both. In the latter case the units are permitted with the assent of the governor-general to legislate in such a manner as to override prior federal Acts on the same topic,¹ and the governor-general has the unusual power² of assigning to federation or units at his discretion heads of legislation or finance not allocated by the Act.

In Canada the heads of the provincial governments are appointed by the federal government and may be removed from office by that government, but this power has ceased to be used in any substantial manner to effect federal ends, the lieutenant-governors having been in practice assimilated in functions to constitutional sovereigns. In Australia the appointment and removal of governors of the states rests with the British Government, and the federal government has no influence whatever in the matter. In India the governors of the provinces are subject to the control of the governor-general, subject to the approval of the secretary of state, in all matters in which they are required to act at their discretion or in their individual judgment.³ In Canada and Australia the governor-general is a constitutional monarch as regards his ministers; in India he is subject to the secretary of state⁴ in matters of his discretion or individual judgment.

In Canada provincial legislation may be disallowed by the federal government, but this power is now largely if not entirely disused as a method of enforcing federal authority, Acts of dubious validity being left to the courts to declare invalid. In Australia no power of disallowance exists on the part of the Commonwealth, and in practice the power of the British Government to secure disallowance is almost obsolete;

¹ 25 & 26 Geo. V, c. 42, s. 107 (2).

² S. 104.

³ S. 54.

⁴ S. 14.

in any event it would never be used to affect matters which could be determined by the courts in respect of state versus federal power.

In both federations enjoying Dominion status the units and the federal government are in possession of full responsible government, which is denied in India, in greater measure in the federation, for defence and foreign relations are administered by the governor-general in his discretion, subject to the control of the Home Government. In the same way the constitutions of Canada and Australia can be amended only at the will of their governments, and Parliaments, with in the case of Australia a popular referendum. The Canadian constitution can be changed only by the British Parliament which would act only on a definite request from both houses of the Dominion Parliament, and such a request would normally be based on agreement with the provinces. In the case of India the power to alter the constitution is entirely vested in the British Government and Parliament.¹

The judicial control in Canada is exercised primarily by the provincial courts, which are organized by the provinces, but whose judges are appointed by the federal government, and on appeal by the Supreme Court, with a final appeal to the Privy Council, or by the Privy Council. In Australia the final control of constitutional issues respecting the relations *inter se* of the federation and state rests with the high court, which may, but in fact does not, allow appeal to the Privy Council in such causes. In India constitutional issues will be dealt with partly by the high courts, partly by the federal court, but the final interpretation of the constitution will rest always with the Privy Council, from which appeals cannot be shut out by any Indian legislation.²

2. THE CROWN AND ITS REPRESENTATIVES

The authority of the Crown over India, which was formerly exercised through the East India Company and which was declared directly exercisable by the Government of India Act, 1858, is declared³ to be exercisable by His Majesty except in so

¹ S. 308.

² S. 110 (b) (iii).

³ S. 2.

far as may otherwise be provided by or under the Act, or as directed by His Majesty. This declaration extends to (1) the rights, authority, and jurisdiction of the King Emperor over the territories in India vested in him, and (2) those exercisable by him in or in relation to any other territories in India, and includes all powers hitherto exercised by the secretary of state with or without his council, the governor-general with or without his council, any governor or local government.

The territories vested in the King are made up of the governors' provinces and the chief commissioners' provinces, which make up British India.¹ India includes British India, all territories of any Indian ruler under the suzerainty of His Majesty, all territories under the suzerainty of such a ruler, the tribal areas, and any other territories which His Majesty in Council, after ascertaining the views of the federal government and legislature, may declare to be part of India. The tribal areas include the frontier lands of India and Baluchistan which are not parts of British India, or Burma, or any Indian or foreign state. The definition shows how anomalous is their position, but internationally they must be recognized as part of India. The Crown has asserted protection over the areas without necessarily securing the assent to the tribes to such a position, and by treaty² the intervention of Afghanistan in regard to these areas has been excluded.

The difference between the relation of the Crown to these areas and territories is reflected in the form of its representation in India.³ The governor-general of India is appointed by commission under the sign manual⁴ to perform the powers and duties imposed on him by or under the Act, and such other powers, not being powers connected with the exercise of the functions of the Crown in its relations to the Indian states, as His Majesty may be pleased to assign to him. The excepted functions fall to the representative of the Crown as regards relations with Indian states in so far as they are assigned to him by His Majesty. Moreover, it is under his authority that powers in this regard can be exercised by any other officers. It was

¹ S. 311 (1); contrast 52 & 53 Vict., c. 63, s. 18.

² Cf. Parl. Paper, Cmd. 324 (1919), 4701 (February 3rd 1934).

³ S. 3.

⁴ The Instructions under the sign manual and signet require an oath on assumption of office, so since 1918; Curzon, *British Government in India*, ii, 187.

suggested by the Round Table Conference¹ that this vital distinction of representation might be emphasized by styling the officer charged with relations with the states Viceroy, but there were obvious objections to this plan which were duly recognized by the joint committee. The term could not well be denied to the governor-general in his position as head of the federation; it therefore will remain ceremonial, and the two aspects of the Crown will not thus formally be distinguished. But, though the two positions may be held by the same person, this is not necessarily the case, and they may be separated should in practice it prove difficult for the governor-general to exercise both sets of functions without inconvenience. Normally, it is suggested, the governor-general, as responsible for the welfare of British India, may be inclined to exercise his functions with some measure of predisposition in favour of his main charge.

The Act clearly recognizes that its terms do not exhaust the powers of the Crown, which can exercise in respect of India all prerogative powers in respect of oversea territories save in so far as they are regulated by the Act.² Thus the Act leaves untouched the vital prerogatives of the control of foreign affairs, including the right to cede territory,³ and of making war or peace or declaring neutrality. It recognizes and saves the right of the Crown or by delegation the governor-general to grant pardons, reprieves, respites or remissions of punishment.⁴ It recognizes again the supreme ownership of all land⁵ in British India by the Crown, and the resulting doctrine of escheat, and the doctrine under which *bona vacantia* fall to the Crown,⁶ but it regulates in both cases⁷ the exercise of the prerogative by assigning the property in question to the Crown for the purposes of the province in which the property is situate. This distinction of the character of prerogative

¹ Cf. the Indian Government, Parl. Paper, Cmd. 3700, p. 192.

² *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A.C. 508.

³ The legislature is forbidden to act by s. 110 (b) (i). See § 16, below.

⁴ S. 295 (2). The prerogative was delegated for the first time in the Royal Warrant of Appointment in 1916.

⁵ Cf. *Transfer of Natural Resources to Province of Saskatchewan*, [1932] A.C. 28.

⁶ Cf. *Att.-Gen. of Ontario v. Mercer* (1883), 8 App. Cas. 767; *Collector of Masulipatam v. Cavalry Vencuta Narrainapah* (1860), 8 Moo. Ind. App. 500.

⁷ S. 174.

authority is necessary since the unity of the authority of the Crown is necessarily broken by the creation of the federal system. In the same way, while under the existing régime it lay with the Crown to allocate executive authority so far as it was not dealt with by statute between the governor-general and the governors or lieutenant-governors of the provinces, its freedom of action is limited by the distinction of federal and provincial spheres. It may be assumed on the analogy of Canadian law that the prerogative right over gold and silver mines¹ attaches to the Crown in respect of the province where such mines are situated, and the waste lands in the provinces are duly vested in the Crown in right of the province, while those in any territory under the federation directly would be federal.

The Crown again enjoys apart from statute immunity from suit for itself, and its property, including its ships.² This immunity has been modified in the case of India,³ as in the case of Canada and Australia in diverse ways by statute, and direct suit against the federation and provinces and in certain cases against the secretary of state is conceded.

There remain reserved to the Crown, free from statutory control, the grant of honours of all kinds⁴ whether in British India or to rulers and subjects of the states, and the regulation of precedence whether in British India⁵ or as between the rulers. In the case of British India these are prerogative rights of the ordinary kind; in that of the states they flow from the special position of the Crown as demanding and receiving the allegiance of the rulers. Acceptance of foreign orders is also regulated by the Crown.

The prerogative of annexation of territory remains unaffected. But to add territory to British India requires the inclusion of such territory in a province, and the inclusion must take place in a specified manner with the consultation of the government and legislatures of India and the province concerned.⁶ But territory could be annexed and included in India with due consultation with the federal authorities only.⁷

¹ *Hudson's Bay Co. v. At.-Gen. for Canada*, [1929] A.C. 285.

² *Young v. S.S. Scotia*, [1903] A.C. 501.

⁴ *Star of India* (1861), *Indian Empire* (1877).

⁶ S. 290.

³ S. 176.

⁵ Warrant, April 9th 1930.

⁷ S. 311 (i).

In general the Crown enjoys in British India all the privileges it has under the prerogative in the case of England save in so far as these are limited by statute. Thus it is entitled to the benefit of the rule that no statute is deemed to bind the Crown unless this is specifically mentioned or is essentially implied by the measure.¹ It enjoys similarly priority in respect of debts² due to the Crown unless precluded by statute.

Further, however, the rights of the Crown in India may exceed apart from statute those of the Crown in England, for it succeeds to all the rights of the East India Company, and that body had by virtue of the acquisition from earlier sovereignties of territory the same rights over these territories as their late sovereigns had.³ This is of importance in certain cases regarding lands and minerals where the Crown has more extensive powers than under English common law.

3. THE UNITS OF THE FEDERATION

The federation is made up of governors' provinces, chief commissioners' provinces, and federated states.⁴ The relation of the federal executive and legislature to these three elements differs in essentials. It is far extending with regard to chief commissioners' provinces, which are subject to the control of the governor-general in executive matters and for which the federal legislature can pass laws, but it is definitely restricted on federal principles for the governors' provinces and the federated states.

The governors' provinces are, under the powers of the Act, increased by the addition of Orissa, which is extended in area by joining to it areas in Madras and the Central Provinces occupied by Oriya people, and of Sind, separated from Bombay.⁵ They thus number eleven, Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar separated from Orissa,

¹ *Secretary of State for India v. Bombay Landing and Shipping Co.* (1868), 5 Bom. H.C.R., O.C.J. 23; *Ganpat Pataya v. Collector of Canara*, I.L.R. 1 Bom. 7, per West, J.; *Secretary of State for India v. Matthurabhai* (1889), 14 Bom. 213; *Bell v. Municipal Commissioners for Madras* (1901), 25 Mad. 457.

² *Ganpat Pataya's case*, u.s.

³ *Rana Ubhee Singh Raja v. Collector of Broach* (1821), 2 Borr. 44; *Salaman v. Secretary of State for India in Council*, [1906] 1 K.B. 613; *Bapoojee Rughoonath v. Simwar Kana* (1822), 2 Borr. 342.

⁴ S. 311 (2).

⁵ S. 289.

Central Provinces and Berar, Assam, North-West Frontier Province, Orissa, Sind, and such other provinces as may be created under the Act, which authorizes such creation by Order in Council after consultation of the federal executive and legislature and the authorities of any province affected.¹ The boundaries of provinces can be varied in like manner. Berar,² though still under the sovereignty of the Nizam is to be administered with the Central Provinces as one province, but, should the agreement for administration cease, the Crown in Council may make any necessary adjustments affecting the provisions of the Act dealing with the Central Provinces. For the purposes of the Act, therefore, British India includes Berar and save as regards any oath of allegiance Berari subjects rank as British subjects.

The chief commissioners' provinces³ are British Baluchistan, Delhi, Ajmer-Merwara, Coorg, the Andaman and Nicobar Islands, and the area of Panth Piploda, now given that status, together with such other provinces as may be created under the Act. Aden, on the other hand, ceases to be a part of India, and is to be governed as directed by Order in Council, without prejudice to the power of the Crown in Council to legislate for the territory. But appeal is to lie to an Indian Court, doubtless the High Court of Bombay, whence a further appeal may be brought to the Crown in Council.

Inclusion in the federation is for the provinces of both kinds automatic, but in the case of the states accession is voluntary, and the date of the proclamation of federation is made to depend on action by the King when an address is presented by both houses of Parliament, and such action is conditional on the accession to the federation of rulers entitled to fill not less than half the 104 seats of the Council of State and having as subjects not less 39,490,956 persons.⁴ Accession is effected by the King's acceptance of an instrument of accession executed by the ruler personally, whereby he for himself, his heirs and successors, declares that he accedes to the federation with the intent that the King, the governor-general, the federal legislature, the federal court, and any other federal authority shall by virtue of his instrument of accession, but

¹ S. 290.² S. 47³ S. 94.⁴ S. 6.

subject always to the terms thereof and for the purposes only of the federation, exercise in relation to his state such functions as may be vested in them by or under the Act, and assumes the obligation that due effect is given within his state to the provisions of the Act, so far as applicable under the instrument. The terms, it will be seen, are carefully chosen to make it clear that the Act asserts no authority over the state save such as follows from his freely executed instrument, which will, of course, permanently and irrevocably limit his sovereignty. The accession, however, can be executed conditionally on the attainment of federation before a prescribed date, thus simplifying the difficult business of securing the necessary accessions by removing the possibility of long delay.

The instrument¹ must specify the matters on which the federation is to have power to legislate for the state, and any limitations of that legislative power and of the federal executive power. The extent of federal power may be enlarged, but not diminished, by a subsequent instrument duly accepted. The federal legislature is given no power over accessions for twenty years after federation is established. Thereafter any request for acceptance of accession must not only be sent through the governor-general, but no request may be transmitted unless both chambers of the legislature have addressed the King asking that the state may be admitted to the federation. The period is somewhat long, but no doubt any later accessions may be weighed by the Crown in the light of feeling in the legislature, though it has no formal *locus standi*. Any instrument must be laid after acceptance before both Houses of Parliament, and it and the acceptance must be judicially noticed by all courts.

Each instrument of accession must provide that a number of provisions of the Act in Schedule II may be amended without affecting the accession of the state, but no such amendment, unless accepted by a supplementary instrument, may extend the functions exercisable by any authority in respect of the state. In view of the improbability of any early amendment of the exempted portions by Parliament, the provision is probably of no immediate importance, but it may well prove to raise

¹ Draft in Parl. Paper, Cmd. 4843, pp. 43, 44.

very difficult questions, should it later be desired to alter the provisions excepted from the general rule. Thus apparently any change as regards the position of the governor-general towards the issues of external affairs and defence would not be consistent with the position of the states. The Act is silent as to the position in such an event; it would certainly be open to any state to argue that such action was equivalent to a breach of the instrument of accession but there is no legal means provided under which the state could attain redress. On the other hand, from the point of view of British India it may seem that a complete bar to full responsibility is presented.

The King is not obliged to accept any instrument, and his discretion is made absolute in this regard. Further, he may not accept any accession whose terms are inconsistent with the scheme of federation embodied in the Act. The latter provision binds the Crown in principle not to accept for the federation any state which is unwilling to accept the greater portion of the subjects in the federal list. Exceptions or reservations to this list ought in the opinion of the joint select committee,¹ to be justified by any ruler on the score of special conditions affecting his state. There are cases of existing treaty rights or usage in matters affecting the postal service, coinage and currency which may justify exemption from the normal rule of federal control; but it is clear that no state could be allowed to claim entry on the score of being willing to accept a select list of topics. Further, the committee stressed the advantages of securing that instruments shall be as far as possible in common form as regards terminology. The interpretation of federal rights in a state may well turn on wording, and it would embarrass the courts if they had to construe instruments differing verbally. A draft form of instrument accordingly has been prepared.

Apart from the control given to the federation by the instrument of accession, the rights and obligations of the Crown in respect of the Indian states remain unaffected by the Act, and a state which does not accede is in theory unaffected by the federation. Indirectly, of course, federation must affect deeply every state. The grant of responsible government to adjacent

¹ Report, i, 87.

provinces must stimulate ambitions in the states; the governor-general is the head of the federal government, and, though directly ministers will have no power over the state relations with the Crown, it is significant that in the case of the Union of South Africa it was felt desirable in 1930 to separate the offices of Governor-General of the Union and High Commissioner in control of Basutoland, the Bechuanaland Protectorate, and Swaziland.¹ There is therefore every motive for states to accept federation and thus exert authority from within the federal structure, a position in entire harmony with accepted Indian ideals of polity. In specific cases there is added the possibility of remission of tribute² or like payments and in one or two that of retrocession of territory or control thereof, as in the case of the rendition of Bangalore to Mysore.

As the King's representative will not control any forces, if he needs the aid of such forces to carry out his duties towards the states he is to be entitled to requisition forces from the governor-general, any extra expense involved being ranked as expenses of the Crown in relation to the states. In this respect, it is clear that special importance attaches to the combination of the offices of representative and governor-general, for, if the two posts were in different hands, there might be grave possibilities of friction, the governor-general doubting if his federal responsibilities were consistent with the proposed use of the forces. As it is, the combination of offices must be deemed sufficient to ensure that policies shall be made consistent with the double form of obligation on either side. It may be noted that the commander-in-chief is commander-in-chief in India, not in British India only.³

The representative of the Crown is authorized to make arrangements with the governors of the provinces for the discharge by the latter and their officers of functions appertaining to the representative. This renders possible the continued employment of local governments for relations with states where this course is recommended by considerations of usage or convenience.

. The special case of the jurisdiction already enjoyed by the

¹ Cf. Keith, *Letters on Imperial Relations*, 1916-35, p. 203.

² Parl. Paper, Cmd. 4103. The total may be £750,000 a year.

³ S. 4.

Crown in certain areas in the states, e.g. at Secunderabad and Bangalore, is provided for by the rule¹ that the Crown may in signifying acceptance of any accession declare that the federal authority shall not apply, due notice of course being given to the ruler that the acceptance will contain such a declaration. By agreement between the Crown and the ruler the federal authority may later be extended on such terms as may be specified in a supplementary instrument of accession. But no notice can be given in respect of any area which is under the Crown's jurisdiction solely in connexion with a railway. Subject to the above rule, on federation any authority of the Crown under the Foreign Jurisdiction Act, 1890,² or otherwise, shall become exercisable by the federal authorities, including the railway authority, except in so far as any agreement may be made under Part VI of the Act for administration of federal legislation by the ruler. The law in the matters concerned in force in the state is to be deemed to be a federal law in so far as the federation under the instrument of accession could re-enact it, but shall cease to have effect after five years if not so enacted, or amended, or repealed. In all other cases the powers of the Crown in a state shall remain unaffected, without prejudice to its power to relinquish such authority, and the Order in Council of 1902 is reaffirmed as valid. It is also provided that an Order under the Act of 1890 may validly authorize judicial or administrative authorities to act in respect of a state though situated outside the state, and that appellate jurisdiction from British courts in Indian states may validly be conferred on the federal court. Moreover, nothing in the Act is to limit the power of the Crown to determine by what courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in Indian states.

4. DYARCHY IN THE FEDERATION

Dyarchy, rejected by the Simon Commission, is deliberately installed in the federation. The governor-general³ is granted the executive power of the King, no provision for personal exercise by His Majesty being contemplated. That power⁴ extends to

¹ S. 294.

² 53 & 54 Vict., c. 37.

³ S. 7.

⁴ S. 8.

all matters in respect of which the federal legislature can make laws, the raising of defence forces for the Crown in British India, and the governance of the forces of the Crown borne on the Indian establishment, and the exercise of rights possessed by treaty, grant, usage, sufferance, or other lawful means in respect of the tribal areas. But in the federated states it extends only to matters over which the federation has legislative power in so far as such executive authority is not reserved in whole or part to the state, and state authority remains unless expressly excluded.

For the administration of federal subjects there shall be a council of ministers¹ chosen and sworn by the governor-general who hold office at his pleasure and may be dismissed by him, acting in his discretion, which means that he need not consult any one as to his action. He fixes their salaries, until settled by the legislature; they may not be varied while in office. Ministers cease to hold office if for any period of six consecutive months they are not members of one of the chambers; this legislative enactment of what is better left a constitutional rule follows the Act of 1919. In the same meticulous spirit it is expressly provided that no court may inquire into the advice given by ministers, and it rests with the governor-general in every case to decide whether or not he is required to act in his discretion or to exercise his individual judgment. He is required to exercise his individual judgment in respect of matters in which he has a special responsibility;² his ministers will advise, but the decision rests with him. These issues are: (a) the prevention of any grave menace to the peace or tranquillity of India or any part thereof; (b) the safeguarding of the financial stability and credit of the federal government; (c) the safeguarding of the legitimate interests of minorities; (d) the securing to, and to the dependents of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests; (e) the securing in the sphere of executive action of the purposes which the provisions of Chapter III of Part V of the Act (dealing with prevention of commercial discrimination) are designed to secure in relation to legislation; (f) the

¹ Ss. 9, 10.

² S. 12.

prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment; (g) the protection of the rights of any Indian state and the rights and dignity of the ruler thereof; and (h) the securing that the due discharge of his functions with respect to matters with respect to which he is required to act in his discretion, or to exercise his individual judgment, is not prejudiced or impeded by any course of action taken with respect to any other matter.

The wide terms of these responsibilities must, of course, be considered in relation to the discussions on which they are based. Minorities to be protected are not political or parliamentary minorities, but well-known classes of the population, and the rights to be protected must be legitimate; minorities cannot claim to block all social or economic progress. The rights of Indian states so far as they are subject to federal control need not be conserved by the governor-general; his responsibility refers to federal, not provincial, action inimical to a state or states, and to the rulers he owes the obligation of securing that due regard be paid to the personal status which they have hitherto enjoyed in British India. He will be bound¹ to secure to the several communities a due share in public appointments. He may not hamper the power of the government and legislature to develop a distinctive fiscal and economic policy, including the making of agreements with the United Kingdom and other countries, and his interference should be limited to prevent action intended to injure the interests of the United Kingdom rather than to further the economic interests of India. But he must oppose indirect as well as direct discrimination or penalization. The task set, of course, is very serious, for it must always be possible to argue that a measure is intended to further Indian economic interests even if it injures British interests. He is also bound to secure that no budgetary or borrowing policy is adopted which would prejudice Indian credit in the world money markets, or affect the capacity of the federation duly to perform its financial obligations. To aid him in his duty and to provide an officer capable of giving financial advice to the government if asked, he is authorized to appoint

¹ Instrument of Instructions in Parl. Paper, Cmd. 4805.

a financial adviser¹ whose conditions of service and whose staff he shall determine. But before any appointment but the first is made, ministers shall be consulted as to the person to be chosen. In safeguarding public officers he is to prevent inequitable treatment, and in dealing with commercial discrimination he is to prevent action which though itself apparently not in conflict with any specific provision of the Act would in practice result in discrimination. To enable him to secure that none of his responsibilities are overlooked, he may after consulting ministers make in his discretion rules as to the information to be given to him, and requiring not only ministers but secretaries to bring to his notice any matter likely to involve a responsibility.² The provision also derives from the Act of 1919, and involves the grave inconvenience of placing the secretaries of departments in the position of compelling ministers to submit to the governor-general issues which the minister may regard as within his sphere.

Too narrowly interpreted the responsibilities might destroy the possibility of responsibility. But the Instructions contemplate as far as possible collective responsibility. The governor-general is to select the council of ministers in the mode usual in choosing a cabinet, that is in consultation with the person most likely to secure a stable majority in the legislature, and, though he is to endeavour to include representatives of the states and minorities, he is to remember the need of collective confidence in the legislature and the fostering of a sense of joint responsibility. Presumably it is accepted that the lower house must determine the tenure of office of the ministry. Ministers will differ in one respect from British ministers; their salaries fixed by the governor-general or the legislature shall not be diminished while in office, a device intended to secure that the government may not be forced to do without ministers through refusal to vote adequate salaries. The advice of ministers is to be followed unless in the governor-general's opinion a special responsibility or some function in which individual judgment is prescribed compels him to act otherwise; curiously enough, no mention is made of the normal case of refusing advice, when the ministry no longer represents the will of the majority of the

¹ S. 15.² S. 17 (4).

legislature or in some cases of the people.¹ It may be taken, therefore, that it is not expected that the governor-general shall feel it right to determine all matters of special responsibility in accordance with his personal preference; that would impose on him too great a burden, and interfere too seriously with ministerial authority. But the responsibilities mark out a sphere in which refusal to accept the advice of ministers and decision to order otherwise will be constitutional.

If in exercise of his rights in these matters the governor-general refuses advice, what is the position of ministers? The answer clearly is that, having accepted office under the constitution which gives such powers, they should remain in office, when the governor-general acts according to his plain duty under the constitution. They have the safeguard against error on the part of the governor-general that in action under the Act in his discretion or individual judgment he is subject to the instructions of the secretary of state,² provided that he satisfies himself that any direction he may wish to give is not inconsistent with the Instructions. Relief can therefore be obtained, if the governor-general is in error by an appeal, as in the classical case in 1892³ in New Zealand when ministers remained in office on the refusal of the governor to add members to the Upper Chamber, until the governor was advised by the Colonial Secretary to accept their advice. They can, of course, resign office, but it would be difficult to justify such action in view of their having taken office in full knowledge of the restrictions on their powers.

In certain fields the governor-general has wider powers, and may act at his discretion.⁴ These cover defence, ecclesiastical affairs (relating in effect to the provision of ministrations to British forces and servants), and external affairs except relations between India and any part of the King's dominions. He exercises also discretion in regard to the tribal areas. In these issues he will be aided by three counsellors appointed by himself, whose conditions of service are determined by the King in Council. But it is not intended that ministers should be ignored; joint consultation is recommended, especially in the

¹ See Keith, *Letters on Imperial Relations*, 1916-35, pp. 210, 347, 348.

² S. 14.

³ Keith, *Responsible Government in the Dominions*, i, 219 ff.

⁴ S. 11.

administration of the department of defence, and the views of ministers are to be obtained in matters affecting the appointment of Indian officers to Indian forces or the employment of such forces outside India. The ministry, and in special the minister of finance, are to be consulted before the defence estimates are settled and laid before the legislature. At the same time the commander-in-chief's views are to be obtained on any question of defence and communicated to the secretary of state if he so desires. It will be seen that the way is open to relieve the commander-in-chief of the excessive burden of taking part in the work of the executive council.

The Act leaves vague the delicate question of the use of Indian troops outside India. It provides,¹ however, that no burden shall be imposed on the revenue of the federation or the provinces except for the purposes of India, so that the governor-general could not provide Indian forces at Indian cost unless he was satisfied that their dispatch served the purposes of India. Nor clearly could he provide forces unless he was satisfied that India could spare them. Clearly if he held that the dispatch of forces did not serve the purpose of Indian defence, though troops were available, he could hardly act without the support of the federal ministry, and in that event the necessary funds would have to be provided by the legislature or the British Government. It is, however, no longer necessary for the British Parliament to approve payment by India for troops employed outside India; that restriction of the earlier régime is swept away.

Control of defence inevitably must involve control in matters ancillary thereto of other departments under ministers and also of the provinces. For both² needs the Act makes full provision. The governor-general therefore may require the minister charged with communications and the railway board to afford facilities for movements of troops, and may order the governors to give the necessary directions in regard to the control of lands, buildings, and other requirements for the forces, facilities for manœuvres, the safeguarding of the health and security of defence units stationed in the provinces, and if necessary the guarding of roads, bridges, canals, etc. In all

¹ S. 150.

² Ss. 12 (A), 12B.

these powers, of course, he is subject to the secretary of state, whose orders he must obey. Where responsibility does not rest with the Indian legislature, it must rest with the British Parliament acting through the secretary of state. This responsibility of Parliament is in the case of India formally expressed, for the Act¹ provides that the original Instrument of Instructions and any later amendment or revocation shall be laid before Parliament and to have effect must receive the approval of both houses. But action may not be questioned on the score of disregard of the Instructions. Though approved by Parliament, the Instructions remain a prerogative instrument, and, if responsible government develops, it will do so under their terms. For instance, it would be possible to instruct the governor-general to consult ministers before acting in his discretion in matters of defence and external relations. This, however, is as far as the power extends. It is clear that, if an attempt were made to require him to act in these matters on ministerial advice, it would contravene the spirit of the Act, which expressly imposes on the governor-general the duty of acting in his discretion, and provides that that part of the measure may not be altered without affecting the adhesion of the states.

The duties of the governor-general involve the appointment by him of an advocate-general,² to perform such functions of advising the federal government and other legal duties as may be assigned to him. He has audience in all British Indian Courts and in federal issues in federated state courts. The governor-general decides his remuneration, and as to appointment and dismissal acts in his individual judgment.

The governor-general is required to make rules of business after consulting ministers,³ and he is instructed to provide that the finance minister shall be consulted on proposals affecting finance, and also on re-appropriation of sums within grants; if there is difference of opinion in a matter of this kind, the council of ministers must decide. This involves assimilation of Indian practice to British Treasury control.

The executive action of the federation is taken in the name of

¹ S. 13. This is a marked innovation on Dominion usage.

² S. 16. He corresponds to the Attorney-General in England; 53 Geo. III, c. 155, s. 111; 21 & 22 Vict., c. 106, s. 29.

³ S. 17 (3).

the governor-general, and orders authenticated under rules made by him may not be questioned on the ground that they are not his acts.¹

The difficulties of dyarchy were clearly exposed in the provinces under the Act of 1919, and there is no reason to suppose that they will not be repeated in the federation. As will be seen, the composition of the legislature is adapted to render it very difficult to secure the basis of an effective ministry, and that may assist the governor-general to secure the assertion of the great authority vested in him. The position of the ministry is deeply affected by the exclusion from its control of the most important expenditure, that on defence, and it may well prove that through this limitation of power responsibility cannot be established effectively.

5. THE FEDERAL LEGISLATURE

The legislature consists of the King, represented by the Governor-General, the Council of State, and the House of Assembly or Federal Assembly.² The Council of State is a permanent body, members retiring to the extent of a third every three years, the Assembly has a maximum duration of five years, the period now normal in Canada and the United Kingdom. Annual sessions are provided for, and the governor-general may in his discretion summon either chamber or both, prorogue the chambers, or dissolve the Assembly.³ He may address either chamber and send messages on pending Bills or other matters. Ministers, counsellors, and the advocate-general may speak in either chamber, but may only vote if elected, or nominated a member.⁴ Each chamber selects a President (Speaker) and deputy, who may be removed only by a vote of the majority of all the members passed on fourteen days' notice.⁵ Approval by the governor-general is not requisite in either case. The speaker holds office on a dissolution until immediately before the meeting of the new Assembly. The presiding officer has a casting vote only. Proceedings in the legislature are to be valid, though later it appears that some unqualified person has sat and voted.⁶ This resolves the doubt

¹ S. 17 (2). ² S. 18. ³ S. 19. ⁴ Ss. 20, 21. ⁵ S. 22. ⁶ S. 23 (2).

debated in *Strickland v. Grima*,¹ but not passed on by the Privy Council, whether an Act is invalid because it was passed by persons not duly elected. It is made the duty of the presiding officer to adjourn or suspend a sitting if less than one-sixth of the members are present; what the legal effect of omission to act would be is conjectural.²

The composition³ of the Council of State is 156 members for British India and up to 104 for the states. The number in the case of the states depends on the number of states acceding to the federation; so long as a tenth of the possible seats is vacant, the members appointed to the seats filled may choose up to half the number of seats unfilled, but this power shall not last for more than twenty years after federation. The provision is intended to secure that states may be induced to enter early, without undue fear of being swamped by British Indian representatives. It is obviously open to objection, and indeed the whole purpose of federation can be fulfilled only by general accession of the states.

The British Indian members are to be directly elected, for reasons given above, with the exception of six, to be nominated by the governor-general so as to secure due representation for the scheduled classes, i.e. the depressed classes, and women and minority communities. There are 75 general seats, 6 for scheduled castes, 4 in the Punjab for Sikhs, 49 Muhammadans, and 6 for women. Seats for Europeans (7), Indian Christians (2), and for an Anglo-Indian are to be filled indirectly by members of electoral colleges composed of such members of the chamber or chambers of the provincial legislatures. The territorial seats are allocated to the governors' provinces at the rate of 20 for Madras, Bengal, and the United Provinces, 16 for Bombay, Punjab, Bihar, 8 for Central Provinces, down to 5 apiece for the four smallest provinces, with one each for Delhi, Ajmer-Merwara, Coorg, and British Baluchistan. Allocation of seats among the states proved of the utmost difficulty, but finally, having regard to the dynastic salute, as opposed to personal salutes and other factors, it was decided to grant 5 seats to Hyderabad, 3 each to Mysore, Kashmir, Gwalior, and Baroda, and less numbers to smaller states, or groups of states,

¹ [1930] A.C. 285.

² S. 23 (3).

³ S. 18 and Sched. 1.

whose rulers would then choose jointly or in rotation. The rules are complex. Necessarily for the first Council it has to be arranged that certain members shall sit only for brief periods, so that the system of the triennial retirement of one-third of the members may be worked. The state representatives are appointed by the rulers, and, though appointed for definite periods of time, the power of resignation could no doubt be insisted on by any ruler who desired to change his nominee. The result in any case is that the members of the Council are essentially of two kinds—members who speak for a limited electorate, and members for expressing the views of an autocratic prince.¹

In the Assembly there are 250 representatives of British India and 125 as a maximum for the states, with a limited power to fill vacancies due to non-accession of states as in the case of the Council. The joint committee decided on indirect election on the ground that contact between member and electorate was vital and could not be achieved under direct election except by making the constituencies hopelessly unwieldy or increasing to absurd proportions the size of the Assembly. Hence the Hindu, Sikh, and Muhammadan members of the provincial Assemblies are to select members of these communities; in the case of the Hindu or general seats a certain number are allocated to the scheduled castes; for them the persons selected as eligible candidates at the primary elections for the provincial Assemblies choose four times the number of vacant seats, to be voted on by the general electorate. The system of proportional representation with the single transferable vote is adopted. Similar voting in electoral colleges made up of the members of each community in the Assemblies is to supply the European, Anglo-Indian, and Indian Christian members, and the seats reserved for women are to be filled by the women members of the Assemblies. Seats for commerce and industry fall to be filled by chambers of commerce and like bodies, for landholders by landholders, for labour by labour organizations. There are four non-provincial seats, filled by the Federated Chambers of Commerce, the

¹ S. 18 (2) and Sched. 1. Madras, Bengal, United Provinces, 37 seats; Bombay, Punjab, Bihar, 30; Central Provinces, 15; Assam, 10; N.W.F.P., Orissa, Sind, 5; Delhi, 2; British Baluchistan, Ajmer-Merwara, Coorg, 1 each.

Associated Chambers of Commerce, commercial bodies in Northern India, and labour organizations respectively.

In the case of the states regard is had *inter alia* to population. Thus Hyderabad with 14,436,148 population has sixteen seats, Mysore with 6,557,802 has seven, Travancore with 5,095,973 five.

No person may be a member of the legislature unless he is a British subject or the ruler or subject of a federated state, and for the Council he must be thirty, for the Assembly twenty-five, years of age, but this restriction is waived in the case of an acting ruler. No member may sit without taking an oath or affirmation in lieu.¹ A British subject swears to be faithful and bear true allegiance, a ruler to do so in his capacity as member of the chamber, a subject of a ruler swears his faith and allegiance to his ruler. A ruler, of course, owes general allegiance, but the specification of the capacity in which he swears derogates in no way from the direct obligation.

Membership² may be resigned, and either chamber may declare vacant the seat of any member absent without permission for sixty days, while a seat is vacated on the occurrence of any disqualification. Disqualifications include the holding of office under the Crown, not being ministerial office or membership of a service of the Crown retained while serving in a state; unsoundness of mind declared by a competent court; insolvency not discharged; offences in connexion with elections declared by Order in Council or federal Act to disqualify; conviction in British India or a federated state of an offence, punished by transportation or imprisonment of not less than two years, unless five years have elapsed since release, or a less period fixed in his discretion by the governor-general; and failure in certain cases to return electoral expenses. No person serving a sentence of imprisonment may be chosen. The penalty for sitting or voting when disqualified is 500 rupees a day recoverable as a debt to the federation.

The privileges³ of members are specifically limited. Freedom of speech in the legislature is assured, subject to the limits of discussion which may be set by the governor-general, as described below, and to the standing orders, and there can be no proceedings in respect of papers published by order of either chamber.

¹ S. 24.

² Ss. 25-7.

³ S. 28.

Other privileges¹ enjoyed by the former legislature are continued, and may be added to, but no Act may confer on either chamber or any officer the status of a court or any punitive power other than that of removing persons infringing the rules or standing orders or otherwise behaving in a disorderly manner. The power of committing for contempt persons who refuse to give evidence or produce documents before committees of the chamber is thus denied, and it was only under pressure in Parliament that the Act was amended to authorize legislation to inflict penalties on conviction by a court of persons refusing to give evidence or produce papers, and the governor-general in his individual judgment is to make rules safeguarding confidential matters from disclosure and regulating the attendance of persons who are or have been civil servants. This power is doubtless necessary; it represents, of course, the limits observed in practice in these matters in the British Parliament. Freedom of speech, of course, does not include the right to publish a speech which is libellous,² apart from publication ordered by either chamber.

Members are to receive such salaries as the legislature may determine; pending action, they are to be paid on the same scale as in the Indian legislature.³

All proceedings in the federal legislature shall be in the English language, but the rules of procedure must permit persons insufficiently or wholly unacquainted with English to use another language.⁴

The rules of procedure⁵ are to be made by either chamber, but the governor-general after consulting the president and speaker shall make rules regulating the procedure in matters affecting functions to be discharged at his discretion or individual judgment; securing the timely completion of financial business; forbidding the discussion of or questions on any matter connected with a state outside the federal sphere, unless he considers that it affects federal interests or a British subject and consents to discussion or questions thereon; prohibiting save with his permission discussion or questions in respect of (a) the relations of the Crown or the governor-general and any

¹ See Act XXIII of 1925: freedom from service as juror or assessor, and civil imprisonment or arrest during session.

² *R. v. Creevey* (1813), 1 M. & S. 273.

³ S. 29.

⁴ S. 30.

⁵ S. 38.

foreign prince or state, (b) matters connected with the tribal areas (save in relation to estimates of expenditure) or any excluded areas; (c) his action in his discretion in relation to provincial affairs; and (d) the personal conduct of the ruler of a state or of a member of his family. The last restriction imposes a serious limitation on the possibilities of exposing scandals, but is part of the price paid for securing state accessions, the rulers being justly resentful of candid criticisms of their medieval methods. The governor-general also makes rules for joint sittings of the chambers. A further grave responsibility¹ to prevent freedom of discussion is given to the governor-general. If he thinks that the discussion of any Bill or clause thereof or amendment would affect the discharge of his responsibility for prevention of any grave menace to the peace or tranquillity of India or any part thereof, he may negative further proceedings thereon. Further, no discussion is permitted of the conduct of a judge of the federal court or of any high court, including states courts of that status, in the discharge of his duties.² This drastic limitation of power is deemed necessary to preserve the independence of the judiciary; in fact, in the British Parliament criticism of judges is drastically limited by convention. Finally, the intervention of the courts is excluded in matters affecting regularity of procedure and the actions of officers in carrying out the procedure of the chambers.³ This affirms a constitutional principle observed in regard to the Imperial Parliament, but whose application to the Dominions is less clearly established.

Legislative procedure⁴ requires that a Bill should normally require the assent of both chambers to become law. It may, save if it is concerned with finance, originate in either house. A dissolution of the Assembly causes the lapse of any Bill passed by it if pending in the Council of State, but does not affect a Council of State Bill. If a Bill is passed by one chamber and rejected by the other, or the chambers disagree as to amendments, or it is not presented for assent with six months after its reception by the other chamber (excluding any period of

¹ S. 40 (2).

² S. 40 (1).

³ S. 41. In 1924 the High Court of Calcutta was prepared to forbid putting of a motion; 51 Cal. 874 (1924).

⁴ Ss. 30, 31.

prorogation or adjournment over four days), the governor-general may notify his intention to call a joint sitting. Such action would normally be taken on ministerial advice, but in his discretion he may summon a joint sitting if the measure relates to finance, or to a question affecting his duty of discretion or exercise of judgment, and he need not wait for rejection or disagreement or the six-month period. The joint session in normal cases takes place in the next session of the legislature after the expiration of six months from the date of notification, but when he acts in his discretion it may take place in the same session. In any event the holding of a session is not affected by the dissolution of the Assembly. At the session questions are determined by a majority of the members voting, and such amendments only may be made as are necessary by lapse of time or arise out of amendments, if any, proposed by one house but rejected by the other.

When a Bill has been passed, it must be presented for assent, refusal of assent, or reservation in the discretion of the governor-general.¹ No delay in such presentation would be constitutional. The governor-general may return the Bill for consideration in whole, or part and may suggest amendments and the chambers must take his suggestions into consideration. A reserved Bill drops unless within twelve months from presentation the governor-general notifies the royal assent. A Bill may be disallowed within twelve months from assent, whereupon the governor-general must forthwith notify disallowance, the Act becoming void from the date of notification. Such disallowance, of course, does not invalidate action taken while the Act was in being. Assent to a reserved Bill and disallowance are expressed by Order in Council.

In financial matters,² the governor-general is required to lay before the legislature a financial statement of estimated receipts and expenditure, showing the sums which are charged on the revenues of the federation and those which are required to meet other expenditure which it is desired to charge on the revenues. Sums on revenue account are to be distinguished from other expenditure and note must be made of those amounts which are included because they affect the special responsibilities

¹ S. 32.

² Ss. 33-7.

of the governor-general. There are charged on the federal revenues, and therefore exempt from the vote of the legislature, (a) the salary, allowances, etc., of the governor-general; (b) debt charges, including interest, sinking fund, redemption, and cost of raising loans; (c) salaries and allowances of ministers, counsellors, chief commissioners, the financial adviser and his staff, and the advocate-general; (d) salaries, allowances, and pensions of judges of the federal court, and pensions of high court judges; (e) expenditure on defence and external affairs—so far as the governor-general is required to act in his discretion, tribal areas, and other territories, and up to forty-two lakhs, exclusive of pensions, on ecclesiastical affairs; (f) sums payable in respect of the functions of the Crown in respect of the states; (g) grants for excluded provincial areas; (h) sums required to meet any judgment decree or award of any court or arbitral tribunal; and (i) any other expenditure charged by the Act or any federal Act on Indian revenues. The decision of the governor-general in his discretion determines the classification of any items. It is open to either chamber to discuss, though not to vote on, the excluded items save those affecting the governor-general and expenditure in respect of the states. This makes it clear that discussion of defence expenditure will be allowable.

Other expenditure must be submitted in the form of demands for grants recommended by the governor-general, the government thus controlling the maximum sums desired, private members having no power to propose or increase expenditure, a legal assertion of the British principle. Either chamber may refuse or diminish a proposed grant, the Assembly being first consulted; if it refuses or diminishes a grant the governor-general may direct that the full grant or some other less amount may be submitted to the Council of State; otherwise the demand is dropped or the diminished sum asked from the Council. In case of disagreement on grants a joint sitting decides.

After discussion the governor-general authenticates a schedule specifying the grants made by the chambers, to which he may add sums not exceeding the amount originally asked for, when the chambers have refused or reduced a grant which he considers necessary in respect of his special responsibilities,

and the sums charged on the revenues under the Act. The authenticated schedule must be laid before the chambers but may not be discussed by them, and it affords the sole authority for expenditure, unless supplementary grants become necessary, when a supplementary statement of expenditure must be laid and subjected to the same procedure as the original statement. Under this procedure the legislature controls expenditure, unless it falls within the reserved heads or affects the special responsibilities of the governor-general. This affords a certain amount of authority to the legislature, but its extent is greatly diminished by the comparatively limited amount of the revenue¹ which remains over after the fixed charges are defrayed.

The initiative of the legislature is denied in the case of a Bill imposing or increasing taxation, regulating the borrowing of money, giving a guarantee or affecting financial obligations of the federation, or charging expenditure on federal revenues; the governor-general must recommend any such Bill, and it may not be introduced in the Council of State. More generally no Bill may be considered which, if enacted, would impose expenditure, without the governor-general's recommendation. It is, however, as usual provided that a Bill is not to be deemed to impose expenditure if it imposes fines or pecuniary penalties, or authorizes fees for licences or for services rendered. Similar exemptions are common in Dominion constitutions and rest on the practice of the House of Commons as regards House of Lords Bills.

As regards legislation certain emergency powers are given to the governor-general.² When the legislature is not in session ministers may advise that circumstances have arisen to require immediate action, and in that case he may issue an ordinance. But he must exercise his judgment as to doing so if the measure is one which could only have been introduced into the legislature with his previous sanction, and he may not promulgate without the King's instructions any ordinance which he would have been bound to reserve, had it been a Bill; this rule covers measures inconsistent with Acts of Parliament, derogating

¹ In 1933-4 debt took 15.86 crores, defence 46.20 crores, pensions 3.02, grant to North-West Frontier Province 1 crore, 66.08 crores out of 78.16 crores revenue.

² *Ss.* 42-4.

from the powers of high courts in a substantial degree, or likely to violate the rules against discrimination.¹ Such ordinances must forthwith be laid before the legislature when it meets and last only for six weeks unless sooner disapproved by resolutions of both chambers; they may be disallowed by the Crown and withdrawn at any time by the governor-general.

Where the exercise of discretion or individual judgment is involved, the governor-general may issue an ordinance, whose duration may not exceed six months but which may be extended by a later ordinance for another six months. Any such ordinance may be withdrawn by him at any time or disallowed by the Crown, and any ordinance extending the period must be laid before both Houses of Parliament.

In addition he may enact forthwith permanent legislation in such matters, explaining his action to the chambers by message, or he may send the chambers a draft of his proposed Act, enacting it after a month's delay and after taking into consideration any resolution passed. Such an Act may be disallowed and must be laid before both Houses of Parliament. Whether ordinance or Act is passed, it is, of course, void unless it is within the ambit of federal power.

Further authority² is given to him in the case of failure of the constitutional machinery. If he is satisfied that the government of the federation cannot be carried on under the Act, he may issue a proclamation declaring that his functions to such extent as is mentioned shall be carried on at his discretion, and assuming any powers exercisable by any federal authority other than the federal court. He may modify the Act for this purpose so far as it affects any federal authority other than the court. Any proclamation may be modified or revoked by a subsequent proclamation; it must be laid before both Houses of Parliament and ceases to operate six months later, unless both Houses of Parliament approve its continuance, when it shall remain in force for a further twelve months. But, if the government of the federation has been carried on for three years under a proclamation (presumably a fresh proclamation issued after the expiry of an earlier proclamation is included) the government must be resumed under the terms of the Act subject to any

¹ Instructions, clause XXVII.

² S. 45.

amendment made by Parliament, which must be subject to the restriction of schedule 2 as regards changes which may be made without affecting the accession of the states. Any law made by the governor-general while a proclamation is in force shall last for two years after the expiry of the proclamation, unless sooner repealed or re-enacted by the Indian legislature, or, where the enactment belongs to the field open to the provinces as well as the federation, by a provincial legislature.

The terms of this power clearly place on the Imperial Parliament the onus of determining how far it will permit suspension of the constitution to operate. The limit of three years was inserted to meet the objections of the states to indefinite suspension, while they are further safeguarded by the restriction on Parliamentary amendment to matters consistent with the general scheme of federation.

6. RESPONSIBLE GOVERNMENT IN THE PROVINCES

As in the case of the federation, the executive government of the province is vested in the King and is exercised by his representative, in this case the governor appointed under the sign manual, his salary being fixed by the Act.¹ His position is largely modelled on that of the governor-general, from whom, however, he differs in the fact that there are no important departments of government which are reserved from the control of ministers. Moreover, he is relieved of any responsibility for the financial stability of his province, though the governor-general may require him to act so as to safeguard the stability of federal finance, and he is not concerned to prevent the discriminatory treatment of United Kingdom or Burmese imports, an issue which falls outside the provincial sphere proper. The executive power of the province extends to all matters on which it may legislate, and in its exercise the governor has the advice of the council of ministers,² appointed and dismissed by him in his discretion; he fixed their salaries until determined by the legislature, and these salaries cannot be varied while ministers are in office.

The governor's responsibilities³ thus extend to (a) the

¹ Ss. 48, 49.

² Ss. 50, 51.

³ S. 52.

prevention of menace to the peace or tranquillity of his province or any part thereof; (b) the safeguarding of the legitimate interests of minorities; (c) the safeguarding of the rights of civil servants past and present and their dependants; (d) the securing in the executive sphere of protection against discrimination; (e) the securing of the peace and good government of areas declared to be partially excluded areas; (f) the safeguarding of the rights of states and the rights and dignity of any ruler; and (g) the securing of the execution of orders given to him under Part VI of the Act (dealing with administrative relations) by the governor-general in his discretion. The governor of the Central Provinces and Berar is required to see that a due proportion of revenue is spent on Berar; the governors of provinces in which there are excluded areas are to secure that no action of theirs in respect of such an area is prejudiced by other action; any governor who is acting as agent for the governor-general, as in the case of the tribal areas connected with the North-West Frontier Province, must see that no action is taken inconsistent with his agency responsibilities, and the governor of Sind is responsible for the Lloyd Barrage and Canals Scheme. In such cases he must after hearing ministers' advice act in his individual judgment, and in so acting he is subject to the directions of the secretary of state.¹ His mode of exercise of his functions is further explained in an instrument under the sign manual and signet,² which explains his specific responsibilities much as in the case of the governor-general. He is to encourage all classes of the population to take their proper place in the public life and government of the province, to secure minorities a due share of appointments, to protect civil servants from inequitable treatment, to prevent measures which would discriminate though not in form discriminatory, and to avoid interference with rights of the states; in the event of doubt as to the existence of rights he is to refer to the governor-general, who as representative of the Crown in relation to the states will determine the extent of such alleged rights. The governor of the Central Provinces is to have due regard in the administration of Berar to the commercial and economic interests of Hyderabad. Care

¹ S. 54.² S. 53, and draft in Parl. Paper, Cmd. 4805.

is to be taken to keep the governor-general informed of the state of matters affecting irrigation in view of the power of the secretary of state to require the employment of officers appointed by himself. Instructions require the approval of both Houses of Parliament. It is to be presumed that he has the right to change a ministry to keep it in touch with the Assembly. He must, it is clear, correspond with the governor-general on all issues affecting the federation, but the Act does not exclude direct relations with the secretary of state as in the case of Australia.

✓ In matters of law and order¹ the governor has special powers. He appoints an advocate-general whose position in the province is similar to that of the advocate-general of the federation. He must exercise his judgment as to the making or amendment of any rules affecting police, civil or military, unless they do not affect organization or discipline. He may also, if he thinks that the peace or tranquillity of the province is menaced by persons meditating crimes of violence for the overthrow of the government, declare that any of his functions shall be exercised at his discretion; he may then authorize some official to speak in the legislature on these issues. He may also in his discretion make rules providing that information in relation to the sources from which information has been obtained regarding such criminal intentions shall not be divulged by any police force member to another member except with the authority of the Inspector-General or Commissioner of Police, or to any other person except on his direction, or by any other person in the service of the Crown to any other person save on his direction. These clauses are intended to provide such security as is possible against any failure in the effort to stamp out terrorism, which in Bengal has prevailed for years, and in 1935 was stated by the governor still to cause grave danger. The necessity of giving authority to the governor is proved by the refusal of the Indian legislature in September 1935 to give permanent force to the legislation necessary to combat terrorism.

The governor after consultation with ministers makes rules of business,² and his instructions require him to secure due

¹ Ss. 55-8.

² S. 59 (3).

consultation of the finance minister on all financial matters, while reappropriation of sums within grants must be made with his consent or that of the council of ministers, as in the case of the federation. He is required to encourage joint responsibility and to avoid any action which permits ministers to evade their own responsibilities by placing the onus on him. In view of the wide sphere of ministerial action, from which practically only the excluded areas in any province are removed, there is every possibility of the development of true responsible government in those provinces where there is the possibility of a stable majority in the legislature, permitting the formation of effective governments. The same result may be possible also in cases where, as in the Punjab and Bengal, one community possesses a slight majority, which, however, will be united by communal feeling.

The governors, like the governor-general, have the assistance of secretarial staffs, appointed at their discretion, whose emoluments they fix.¹ They enjoy also with the secretary of state immunity while in office from any proceedings in Indian courts, and no process may issue from such courts (e.g., to act as witnesses) against them, whether in a personal capacity or otherwise, and except with the sanction of the King in Council no proceedings may be brought in any Indian court against any person who has filled these offices in respect of any official act or omission. The clause² is rather obscurely drafted, but it can be interpreted to mean that even in respect of personal actions, unconnected with official duties, e.g., a private debt or assault, these officers are exempt from liability to proceedings while in office. If so the exemption is probably greater than that enjoyed even by the Lord Lieutenant of Ireland. These officials, however, remain liable to proceedings in English courts so far as these can be brought under English law,³ whether for private debts or for official misdemeanours. Moreover, as the clauses of the Government of India Act dealing with misconduct of officials in India will disappear under the new constitution, these officials may be punished for criminal action in India by the Court of King's Bench under the

¹ S. 305.

² S. 306. The Bill was clearer.

³ Cf. *Mostyn v. Fabrigas* (1774), 1 Cowp. 161; *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1; *R. v. Eyre* (1868), L.R. 3 Q.B. 487.

Governors' Act, 1699,¹ as extended in 1802, or for murder or manslaughter under the Offences against the Person Act, 1861. Though efforts have at times been made to proceed in England against governors, there is no recent example of successful action.

7. THE PROVINCIAL LEGISLATURES

The King represented by the Governor is associated in each province with one or two chambers; in the Punjab, the Central Provinces, the North-West Frontier Province, Sind, and Orissa there is a single Legislative Assembly; Madras, Bombay, Bengal, the United Provinces, Bihar, and Assam have two chambers. The Legislative Councils represent a concession to conservative feeling in India and the United Kingdom, and prime importance attaches to the Assemblies, there being no state interests as in the federation to confer a high importance on the upper chamber. In the federation the states would gladly have seen the upper chamber made of full equality of powers even in finance with the lower, but in deference to precedent certain concessions, as seen above, had to be made in that regard, though otherwise equality of powers was established, subject to the greater numerical strength of the lower chamber in the event of the decision of differences of view by a joint session.

The Council is a permanent body, one-third of the members retiring each three years, the Assembly, unless sooner dissolved, lasts for five. The governor's powers, to summon, prorogue, and dissolve, to address and send messages, the right of ministers and the advocate-general to speak, the election of President and Speaker, the rules as to quorum and the non-effect of irregular membership on proceedings are as in the federation, except that in the case of the councils ten members form the minimum permitted to act.

The membership of the Assemblies was an issue bitterly contested, and as we have seen finally settled by the British Government's communal award of August 4th 1932, as modified by the creation of Orissa as a distinct province, and the Poona

¹ 11 & 12 Will. III, c. 12; 42 Geo. III, c. 85; Keith, *Responsible Government in the Dominions*, i, 97 f.

Pact of September 25th 1932 regarding the treatment of general, i.e. Hindu, constituencies. Under the pact a substantial proportion of the general seats are assigned to the depressed classes—officially the scheduled castes. The members of these bodies in the registered electorate meet in primary elections and choose four candidates for each vacancy reserved for them, and the candidate who is given first place in voting by the general electorate is awarded the seat. This secures the unity of the Hindu community together with protection for the depressed classes. Seats are also provided for Muhammadans, Sikhs in the Punjab and the North-West Frontier Province, Europeans, Anglo-Indians, Indian Christians, representatives of commerce, industry, mining and planting, landholders, and labour. Women have general seats in all save the North-West Frontier Province; there are Muhammadan seats in most provinces, an Anglo-Indian in Bengal, a Sikh in the Punjab, and a Christian in Madras. The size of the houses varies from 250 for Bengal, 228 United Provinces, 215 Madras, 175 Bombay and Punjab, 152 Bihar, 112 Central Provinces and Berar, 108 Assam, to 60 for Sind and Orissa and 50 for the North-West Frontier Province. A small Muhammadan majority is assured in Bengal, where Muhammadans have 117 seats assigned and will have a few others under different heads, in the Punjab where they have 84, and the Sikhs 31, the North-West Frontier Province and Sind with 36 and 33 seats respectively: in the others Hindus predominate, though not very markedly in Assam.

The constitution of the Legislative Councils varies. In Bengal the maximum number is 65, the minimum 63; there are 10 general, 17 Muhammadan, and 3 European seats, 27 selected by the Assembly by proportional representation with the single transferable vote, and from 6 to 8 nominated by the governor to secure due representation in special of the depressed classes and women. In Bihar the corresponding figures are 30, 9, 4, 1, 12, and 3 or 4. The other provinces have no members chosen by the Assemblies, but general, Muhammadan, and European seats, with 3 Indian Christian seats in Madras where the maximum is 56. Bombay has a maximum of 30, the United Provinces 60, Assam 22.

Members¹ must be British subjects or rulers or subjects of federated states or such other states as may be prescribed. They must take an oath before sitting, and their disqualifications are as in the federation. No persons may be a member of the federal and a provincial legislature; the provincial seat becomes vacant after a period prescribed by the governor if the seat in the federal legislature is not resigned. No person may be a member of both chambers; members may resign or be removed for absence. Their privileges are precisely as in the federation; where not defined they are those of the former provincial councils, and their salaries until fixed by the legislature are as under the former régime.

Proceedings² in the legislatures shall be in English³ but with permission to persons insufficiently acquainted therewith to use another language. Rules of procedure may be made by either chamber, and the governor has similar powers to those of the governor-general to make rules regulating discussion, with the necessary exceptions arising from the limitation of his authority to his province. Curiously enough he may not deal with discussions of, or questions on, matters in which he has been instructed by the governor-general to act. He has power to prevent discussion of any Bill or clause or amendment which is likely to affect his responsibility for tranquillity. The discussion of the judicial conduct of any federal judge or high court judge is forbidden, and no irregularity of procedure nor action by officers of the legislature may be called in question in any court.

Procedure in legislation is based on the federal model, but with some distinctions. Thus⁴ where two chambers exist, the governor may call a joint sitting only if a Bill is not presented for assent within twelve months after it has been sent by one chamber to another, though the period may be shortened if the Bill relates to finance or a matter of special responsibility. When passed a Bill may be assented to, refused assent, or reserved for the consideration of the governor-general. The Instructions require that any Bill shall be reserved if it is repugnant to an Imperial Act, seriously derogates from the position of the high court, affects the permanent settlement, or

¹ Ss. 67-71.² Ss. 84-7.³ S. 85.⁴ Ss. 73-7.

appears to provide for discrimination. In the case of the Central Provinces and Berar reference must be made in assent to the agreement with the Nizam for legislation and administration. The governor may send back a Bill for reconsideration with amendments, and the governor-general may assent to a reserved Bill—with similar reference in the case of a Bill affecting Berar, or refuse assent, or reserve for the King's pleasure, or direct that the Bill be sent back for consideration with a message. A Bill reserved may be assented to and an Act assented to disallowed by the King in Council as in the case of the federation.

∴ In financial matters¹ procedure is analogous to that in the federation. The sums charged on the revenues, and therefore not votable, are the governors' salary; debt charges; charges for salaries of ministers and the advocate-general, and judges; expenditure for excluded areas; sums to meet judgments or awards of court; and any other sums charged by the Act or any provincial Act. The sums for the governor's salary is exempt from discussion; other items may be discussed. Expenditure not thus charged must be presented to the Assembly only in the form of demands for grants; it may refuse or reduce. The governor authenticates a schedule of grants made, to which he may add grants refused or reduced where his responsibilities are concerned, and sums charged; this forms the authority for expenditure subject to his power to submit a supplementary estimate. Financial bills fall under the same principles as in the federation, the councils being permitted a voice but no initiative. A special security is provided for the expenditure on European and Anglo-Indian education. If provision for these purposes has been made in the last complete year before the new system comes into force, then, unless the Assembly by a majority of three-fourths at least of its members otherwise resolves, provision must be included to the extent of the average expenditure for the ten years ended March 31st 1933 unless the total educational expenditure is reduced below that average, when a proportionate reduction is permitted. This legislative safeguard does not lessen the duty of the governor to safeguard minorities.

¹ Ss. 78-83.

The governor¹ may at the instance of ministers when the legislature is not in session issue ordinances, which must be laid before the legislature when it meets and fall under the same rules as governor-general's ordinances. In their case, however, the governor must use his judgment if the ordinance covers a matter which could have been dealt with by Bill only with his or the governor-general's prior sanction, and must not without the governor-general's sanction promulgate an ordinance which could, if a Bill, only have been introduced with the latter's sanction or which must have been reserved. He may also in matter involving his discretion or individual judgment issue ordinances with six months' maximum duration, but capable of being extended for a further six months; this power is directly based on the similar federal power, and except in emergency must be used only with the concurrence of the governor-general; if issued without concurrence, the governor-general may direct withdrawal. An ordinance duly issued has the effect of an Act reserved and assented to by the governor-general in that it can repeal or alter a federal Act operative in the sphere of legislation open to federation and provinces.

With the governor-general's concurrence the governor may also issue permanent Acts either forthwith or after consideration of the views of the legislature. With like concurrence the governor may by proclamation² exercise in case of a breakdown of the constitution in the province like functions to those of the governor-general, subject to the same control by Parliament and a maximum duration of three years. Laws made under the proclamation have a duration of two years after its expiry subject to repeal or re-enactment by the appropriate legislature.

The governor³ is given also a special position as regards excluded or partially excluded areas. These areas are defined by Order in Council, and thereafter the King in Council may direct that the whole or part of an excluded area shall become or be made part of a partially excluded area, or that the whole or part of a partially excluded area shall cease to be excluded; alter by way of rectification boundaries of any area; and on the creation of a new province or alteration of boundaries declare

¹ Ss. 88-90.² S. 93.³ Ss. 91, 92.

any area not previously included in the province to be excluded or partially excluded. It will be seen that original exclusion after the first Order in Council is prohibited. In regard to these areas no federal or provincial Act may apply save under notification by the governor, who may provide for its modification or exceptions in its application. Moreover, with the subsequent assent of the governor-general in his discretion, he may make regulations for the peace and good government of any area and repeal or modify any federal, provincial or other law applicable thereto. Such regulations may be disallowed by the Crown.

The executive power of the province extends to such areas, but in the case of excluded areas must be exercised by the governor in his discretion.

8. THE FEDERAL AND PROVINCIAL FRANCHISES

The arrangements for the franchise in India rest essentially on the findings of the Franchise Committee¹ appointed after the second session of the Round Table Conference, charged with the duty of recommending a franchise which would give the vote to not less than 10 per cent of the total population as recommended by the Simon Commission, nor more than the 25 per cent favoured by the Round Table Conference. Either figure meant a great advance on the 8,744,000 voters—not more than 398,000 being women—under the Act of 1919. As originally indirect election was proposed for both federal houses, no special federal franchise was necessary, but the decision to provide direct election for the Council of State necessitated a special franchise for that chamber. It was decided to base that on the franchise for the old Council of State, broadening it to give about 100,000 voters, and bringing it into close connexion with the franchise for upper chambers in the provinces.

For the provincial assemblies² provision was in part made in

¹ Report and 4 vols. of evidence, etc. (1932); Cmd. 4086. For the electorate for the Council of State, Provincial Councils, and Chief Commissioners' Provinces for the federal legislature, see Cmd. 4998.

² S. 291 gives a general power to delimit constituencies, decide franchise qualifications, and deal with the conduct of elections to the King in Council.

the Act, in part left to be made by the King in Council, the provincial legislature, or the governor. As far as practicable territorial constituencies are provided for, certain numbers being allocated as general seats, Muhammadan, Anglo-Indian, European, and Indian Christian. An electoral roll is to be prepared for each constituency, and the persons belonging to the specified classes are to be enrolled in them and excluded from the general constituency. A European is any person whose father or other male progenitor in the male line was a European and who is not a native of India; an Anglo-Indian is a European in this sense who is a native of India; and a native of India is any person born and domiciled within the dominions of His Majesty in India and Burma of parents habitually resident in India or Burma and not established there for temporary purposes only. No person may vote at a general election in more than one territorial constituency, but an exception is made in favour of women where special territorial constituencies for them exist, as they may vote therein and in one other. Territorial constituencies on like bases are provided for the councils, but for general, Muhammadans, Europeans, and in Madras only Christians.

Assignment to a territorial constituency is based on residence, but that varies. Madras demands 120 days in the previous financial year, but residence is not rigorous and may be maintained by occasional sleeping in a house, if there is the possibility of user. Bombay requires 180 days' residence in the constituency or a contiguous area, variously defined. In Bengal the requirements for a Calcutta constituency are fulfilled by residence in Calcutta and a place of business in the constituency, while a European may be enrolled in the European constituency if employed anywhere in Bengal, though on leave of absence:

Universal suffrage being utterly impossible, or indirect voting to give the lower classes representation being ruled out as impracticable on various grounds, the qualification for the franchise in territorial constituencies is necessarily based on property, which may be gauged by land revenue, by various conditions of agricultural tenancy, by assessment to income tax, and in the case of the towns by the amount of rent paid.

These varied conditions, which have had to be adapted to each province so that as far as possible the same types of persons may be given the vote in each, are supplemented by qualification by an educational requirement, also varied, and, in addition, there are special qualifications intended to secure an adequate representation of women and the depressed classes, of whom it is hoped to enfranchise 10 per cent. The task is necessarily one of great complexity. There are also to be prescribed the qualifications for the non-territorial constituencies, such as commerce, industry, landholders, and labour. Moreover, all officers, non-commissioned officers, and men of the Indian forces and the police forces are given the vote if on pension or retired. In the case of labour constituencies there have to be disposed of the contending claims of trade unions and labour constituencies.

In the case of women special provisions had necessarily to be made, because the Hindu social system in the great majority of cases does not permit a woman to possess in her own right property which would entitle her to the vote. Accordingly, in general, women are enfranchised who have the property qualification in their own right, or are wives or widows of men so qualified, or are wives of men with a service qualification, or are pensioned widows or mothers of members of the military or police forces, or who possess a literary qualification. It is, however, required that, where the qualification is not held in the woman's own right, she must make application for enrolment, a condition which may seriously reduce in some cases the numbers enrolled. But this application qualification is waived in the case of Bengal, Bihar, Orissa, the Central Provinces, and the urban areas of the United Provinces. It is hoped thereby to give the vote to more than 6 million women as opposed to 28 or 29 million men, a striking improvement on the 315,000 under the Act of 1919.¹

In the view of the joint committee the proposals accepted remedy in some degree the balance between town and country, and provide the vote for the majority of the small

¹ A committee was appointed (August 1st 1935) to delimit provincial and federal constituencies, one-member constituencies to be preferred, manageable in area in number of voters, and in physical characteristics: in two-member constituencies the single non-transferable vote might be adopted. See Cmd. 5099, 5100.

landholders, the small cultivators, urban ratepayers, and a substantial section of the poorer classes, besides providing for women, the depressed classes, and industrial labour. No important section of the community should lack means of expressing its wishes, and the general mass of the people is represented fairly.

9. THE CHIEF COMMISSIONERS' PROVINCES

The Chief Commissioners' Provinces, British Baluchistan, Delhi, Ajmer-Merwara, Coorg, the Andaman and Nicobar Islands, and Panth Piploda, fall directly under the administration of the governor-general acting through a chief commissioner appointed at his discretion.¹ Normally the federal legislatures has full legislative authority over them.²

For British Baluchistan the governor-general shall act at his discretion, but the executive authority of the federation applies to the territory and to the other provinces. No federal Act, however, applies to the territory unless applied with or without modifications by the governor-general, who may also, subject to disallowance by the Crown, make regulations for the territory which may supersede any federal Act or other law applicable thereto.³ He possesses like authority to make regulations for the Andaman and Nicobar Islands.⁴ In the case of Coorg the existing legislature and financial arrangements stand until altered.⁵

The rules applicable in the provinces to police regulations, the prevention of crimes of violence, and the restrictions on disclosure of documents are applied to the relation of the governor-general to the federal chambers.⁶

Otherwise the rules in force as to these territories remain unaltered. Power exists under the Act to confer on them provincial status.⁷

Aden ceases to be part of British India, and its government may be regulated by Order in Council. In accordance with colonial usage such Order may delegate legislative power to any person or persons in Aden, but without impairing the power

¹ S. 94.

⁶ S. 97.

² S. 110 (4).

⁶ S. 98.

³ S. 95.

⁴ S. 96.

⁷ S. 290.

of the Crown in Council to legislate. The Order must provide for appeal from the Aden court to an Indian court (no doubt Bombay), and such expenses for this service as the King in Council may determine shall be paid; it shall also regulate the appeal to the Privy Council from the Indian court in Aden appeals. Moreover, the government of Aden is to be made liable to suit in cases where it would have lain against the secretary of state in council, and property held for the government of Aden is vested in the Crown for the purposes of that territory.¹

10. THE DIVISION OF LEGISLATIVE POWER

As is inevitable in a federation there is distinction of legislative authority both as regards ambit and subject-matter. The power² of the federal legislature extends to making laws for any part of British India and any federated state, that of the provincial legislatures to making laws for the province or any part thereof. Federal Acts may have extra-territorial operation in regard to (1) British subjects or servants of the Crown in any part of India; (2) to British subjects domiciled in any part of India wherever they may be; (3) to, or to persons on, ships and aircraft registered in any part of British India or a federated state wherever they may be; (4) in the case of matters on which the federation may legislate for a state to state subjects wherever they may be; and (5) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of and persons attached to the force wherever they may be. The definition of power is important and valuable; the failure in Dominion legislation to define the precise extent of authority claimed is extremely confusing. The province, on the other hand, is given no extension of power; it resembles the provinces of Canada which are restricted deliberately to legislation in the province.

As regards subject-matter, as already noted, the constitution provides three lists,³ the federal legislative list, the provincial

¹ S. 289. Transfer was protested against by the Assembly, September 16th 1933.

² S. 99. Cf. Keith, *Journ. Comp. Leg.*, 1935, p. 278. ³ S. 100 and Sched. 7.

legislative list, and the concurrent legislative list. A rigid distinction of power thus first appears in Indian legislation, for under even the constitution of 1919 a province might for that area vary central legislation if the governor-general gave previous sanction, and even if sanction were not obtained, a provincial Act assented to by the governor-general could repeal a prior central Act. But the inconvenience of this principle, which renders void any law passed by a legislature outside its sphere, is minimized by the existence of the list of concurrent subjects, which includes most of the matters on which federal legislation may be desirable for international conventions or to preserve uniformity, to give a lead to the provinces as in the case of labour legislation, or to regulate matters extending beyond one province as in the case of diseases of animals. In the concurrent sphere the doctrine¹ that a federal Act supercedes a provincial Act, which is in force in Canada and Australia, cannot be given effect in full, for there would be danger of the federation unduly tying the hands of the provinces and preventing for instance the variation of legislation on crime necessary to meet a provincial need. Hence, while normally a federal Act or a central Act on a concurrent subject overrides a provincial Act, if such an Act has been assented to after reservation by the governor-general, it prevails over prior legislation.² The federal legislature may vary such an Act, but the prior sanction at discretion of the governor-general is required for the introduction of such a Bill into the legislature.

The federal legislature may also regulate any provincial subject for two or more provinces at the request of the chambers of these provinces, but any such Act may be varied or repealed by the provincial legislatures.²

The governor-general in his discretion may also assign to the federation or the province power to make a law or impose a tax on any subject-matter not included in either list, and the executive power of the federation or province shall also apply.⁴ Before making such an assignment, the governor-general necessarily must satisfy himself that there is no provision assigning the matter to one side or the other; in doing so he would presumably consult the federal court.

¹ S. 107 (1).² S. 107 (2).³ S. 103.⁴ S. 104.

The Instructions¹ in accordance with the view of the joint committee recognize that in regard to concurrent topics there is real risk of difficulty. The governor-general should take into consideration the question of the burden to be placed on provincial resources, and in cases where his previous sanction to proposed legislation in the concurrent sphere is requisite, because it proposed to give directions for execution of such a law to the province, he is bound to satisfy himself that the provinces have been consulted. In the same way, while he is to consider seriously provincial desires to vary the main codes, he must also bear in mind the advantages of uniformity in such matters.

In regard to the implementing of treaties and agreements with other countries federal power is limited, for it extends only when the governor of the province affected and the ruler of any state affected has given prior assent.² An Act so passed may be repealed by the federation, and if the treaty ceases to be operative by the province or state. This limitation, of course, applies only where the subject-matter is not otherwise within federal authority paramount as sole or concurrent, but the limitation may prove inconvenient. In Canada³ the extent of power to legislate on provincial topics on this ground is still disputed. In Australia it has never been decided that under the authority as to external affairs the federation may invade the field reserved to the states.

The federal legislature may apply the Naval Discipline Act to Indian naval forces, subject to such modifications as may be made by Indian Act to adapt the requirements of the Act to Indian circumstances, and to such changes as may be made by the King in Council to regulate the relations of the British forces and ships to those of India. If, however, the Indian forces and ships are placed at the disposal of the Admiralty, the Naval Discipline Act shall apply without modification.⁴

Invasion of the provincial sphere by the federal legislature may be authorized in his discretion by the governor-general if

¹ Clause XXV, XXVI.

² S. 106; Keith, *Journ. Comp. Leg.*, 1935, p. 277.

³ Keith, *Constitutional Law of the British Dominions*, pp. 324, 332, 333.

⁴ S. 105. This corresponds with the position of the Dominions under the Naval Discipline (Dominion Naval Forces) Act, 1911 (Keith, *Responsible Government in the Dominions*, ii, 1009 ff.)

in his opinion a grave emergency exists, whereby the security of India is threatened whether by war or internal disturbance. The governor-general's previous sanction of the proposed legislation is necessary, and he must satisfy himself that the provision proposed is proper. Such legislation during its operation is paramount over provincial legislation, prior or subsequent. But the proclamation of emergency which is the prelude to legislation by the federation may be revoked by the governor-general. It must also be laid before the two Houses of Parliament, and it falls to the ground unless within six months both Houses by resolution approve it. Any federal law thus made expires six months after the expiry of the proclamation of emergency.¹ For this power there is no parallel in Canada or Australia, save to the very limited extent that grave emergency, such as war conditions, has been held sufficient in both Dominions to justify the passing of legislation controlling domestic issues, which in peace the federation could not deal with.²

As regards the states the federation may legislate only in respect of matters accepted by the instrument of Accession of the state concerned. The state may legislate, but its legislation is void in so far as it conflicts with a valid federal Act.³

The federation has unfettered power of legislation as regards matters in the provincial list except in the case of a province or the parts thereof.⁴ This means that it may legislate for any territory not included in the governors' provinces, and may, unlike Canada, legislate, under its extra-territorial power, on provincial matters.

The federation, of course, retains the legislative powers conferred on India by such Acts as the Extradition Act, 1870, the Slave Trade Act, 1876, the Fugitive Offenders Act, 1881, the Colonial Courts of Admiralty Act, 1890, the Merchant Shipping Act, 1894, and other general empowering Acts, but its specific powers render these unimportant in the main. Imperial legislation for India is rare: the Official Secrets Acts are suspended while the Indian Act XIX of 1923 is operative. The provision in the Whaling Industry (Regulation) Act, 1934,⁵ giving extra-territorial validity to Indian legislation, is motivated by doubts

¹ S. 102.² Keith, *op. cit.*, p. 327.³ S. 107 (3).⁴ S. 100 (4).⁵ 24 & 25 Geo. V, c. 49, s. 15 (1).

of the extent of Indian power prior to the new Act of 1935. It is to be noted that nearly all British Acts which apply to India may now be varied or repealed by the Indian legislatures, subject to the prior sanction of the governor-general.¹ This matter might be of substantial importance in the case of merchant shipping, as the present system of control rests on the supremacy of British legislation. It must be remembered that India was proposed as a signatory to the agreement of 1931 regarding merchant shipping.² Safeguards on this head, however, are provided in the spirit of that agreement in the present Act.³

The Legislative Lists are as follows:⁴

LIST 1

Federal Legislative List

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment; central intelligence bureau; preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops),⁵ the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

¹ See § 11 below.

² Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 222-30.

³ S. 115. See § 11 below. ⁴ Sched. 5. ⁵ These fall under the state's control.

6. Public debt of the Federation.

7. Posts and telegraphs, including telephones, wireless, broadcasting and other like forms of communication; Post Office Savings Bank.

8. Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal meteorological organizations.

15. Ancient and historical monuments; archaeological sites and remains.

16. Census.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom;¹ pilgrimages to places beyond India.

18. Port quarantine; seamen's and marine hospitals, and hospitals connected with port quarantine.

¹ This leaves immigration of Dominion British subjects to federal control.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

22. Major ports, that is to say the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

23. Fishing and fisheries beyond territorial waters.

24. Aircraft and air navigation; the provision of aerodromes; regulation and organization of air traffic and of aerodromes.

25. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.

26. Carriage of passengers and goods by sea or by air.

27. Copyright, inventions, designs, trademarks and merchandise marks.

28. Cheques, bills of exchange, promissory notes and other like instruments.

29. Arms; firearms; ammunition.

30. Explosives.

31. Opium, so far as regards cultivation and manufacture, or sale for export.

32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and

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of corporations, whether trading or not, with objects not
confined to one unit.¹

34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.

35. Regulation of labour and safety in mines and oil-fields.

36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries,

¹ This provision is so vague that the confusion of power seen in Canada is likely to be repeated, Keith, *Responsible Government in the Dominions*, i, 547-9. See List II, no. 33.

allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorized by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purpose of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalization.

50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.¹

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

54. Taxes on income other than agricultural income.

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

56. Duties in respect of succession to property other than agricultural land.

57. The rates of stamp duty in respect of bills of exchange,

¹ Contrast the freedom of migration in Canada and Australia.

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cheques, promissory notes, bills of lading, letters of credit,
policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway
or air; taxes on railway fares and freights.

59. Fees in respect of any of the matters in this list, but not
including fees taken in any Court.

LIST II

Provincial Legislative List

1. Public order (but not including the use of His Majesty's
naval, military or air forces in aid of the civil power); the
administration of justice; constitution and organization of all
courts, except the Federal Court, and fees taken therein;
preventive detention for reasons connected with the mainten-
ance of public order; persons subjected to such detention.

2. Jurisdiction and powers of all courts¹ except the Federal
Court, with respect to any of the matters in this list; procedure
in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other
institutions of a like nature, and persons detained therein;
arrangements with other units for the use of prisons and other
institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service
Commissions.

7. Provincial pensions, that is to say, pensions payable by
the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession
of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions con-
trolled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the
provisions of this Act and of any Order in Council made
thereunder.

¹ This will obviate constant legislation by the Indian legislature to allow appeal
to the High Courts under provincial Acts, e.g. Act XXIV of 1932.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorized by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.

13. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burial and burial-grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water-supplies, irrigation and canals, drainage and embankments, water-storage and water-power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization;

Courts of Wards; encumbered and attached estates; treasure trove.¹

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the Provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

27. Trade and commerce within the Province; markets and fairs; money-lending and money-lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor; unemployment.

33. The incorporation, regulation, and winding-up of corporations, other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

34. Charities and charitable institutions; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

¹ Cf. S. 174.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs.

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

LIST III

Concurrent Legislative List

PART I

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrators-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

PART II¹

26. Factories.

27. Welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibition.

34. Persons subjected to preventive detention under Federal authority.

¹ This list includes matters on which a Federal Act, with prior consent of the governor-general, may confer the power to give directions to a province; s. 126 (2). See § 12 below.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

11. THE RESTRICTIONS ON LEGISLATIVE POWER

In the Dominions the powers of those Dominions which are bound by the provisions of the Statute of Westminster, as are Canada, the Union of South Africa, and the Irish Free State, are free from any restriction, save such as are due in the case of Canada to the federal character of her constitution. Australia and New Zealand remain still, unless and until they adopt the Statute, subject to the restriction of the Colonial Laws Validity Act, 1865, under which their Acts, if repugnant to imperial legislation applying to them are to that extent void, and to the much more vague restriction of territorial limitation so that, for instance, it was necessary for express power to legislate with extra-territorial force to be given for the enforcement of the whaling convention of 1931.¹ In the case of India there are certain further limitations of an absolute character, and in certain other cases, in complete deviation from Dominion practice but in accord with Indian precedent, legislation is forbidden without the previous sanction given in the discretion of the governor-general or governor.

The supremacy of Parliament over British India and its power to legislate therefor or any part thereof are reasserted in the Act,² in accordance with precedent, and it is expressly provided that no legislature, provincial or federal, may make any law affecting the sovereign or the royal family, or the succession to the Crown, or the sovereignty, dominion, or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the law of prize or prize courts. All these matters are issues definitely connected with sovereignty, which naturally may not be altered by a legislature definitely subordinate. In the same way the legislatures may not alter, except as specifically provided, the Act itself, or any Order in

¹ Whaling Industry (Regulation) Act, 1934.

² S. 110.

Council under it, or any rules made under it by the secretary of state, the governor-general, or a governor in his discretion or in his individual judgment. Further, except as provided in the Act no legislature may derogate from the prerogative right of His Majesty to grant special leave to appeal from any Court.

Any Act which may be passed repugnant to these rules is, of course, *pro tanto* invalid. In other cases Acts may be passed, provided prior sanction is given by the governor-general in his discretion. These include any Bill or amendment which (a) repeals, amends, or is repugnant to any provisions of any Act of Parliament which extends to British India; (b) repeals, amends, or is repugnant to any governor-general's or governor's Act, or any ordinance promulgated in his discretion by the governor-general or a governor; (c) affects matters as respects which the governor-general is required to exercise his discretion; (d) repeals, affects, or amends any Act relating to any police force; (e) affects the procedure for criminal proceedings in which European British subjects are concerned; (f) subjects persons not resident in British India to greater taxation than persons resident in British India, or subjects companies not wholly controlled or managed in British India to greater taxation than companies wholly controlled and managed therein; or (g) affects the grant of relief from any federal tax on income in respect of income taxed or taxable in the United Kingdom. Further, the governor-general's sanction is requisite for the introduction into a provincial legislature of legislation of the kind indicated in sections (a), (c), and (e) above, and of legislation affecting any of his Acts or ordinances, while the governor's assent is requisite for legislation affecting his Acts or ordinances or the police force.¹ In addition to these general provisions in certain other cases prior sanction is requisite. Thus the governor-general or the governor must sanction the introduction of financial Bills;² the former must sanction the introduction of any Bill in the concurrent sphere which provides for the giving of directions to the provincial governments,³ or any Bill which affects taxation in which the provinces are interested.⁴

¹ S. 108.

² Ss. 37, 82.

³ S. 126 (2).

⁴ S. 141. See also ss. 153, 166 (3), 182 (2), 226 (2), 267 (a), 271, 299 (3).

These restrictions, it will be seen, are in part directed at preventing the passing of legislation which is intended to or would discriminate against British commercial interests in India. These are reinforced by the special responsibility above noted of the governor-general to prevent action subjecting to discriminatory action goods of British or Burmese origin imported into India which is intended not to enable him to dictate Indian fiscal policy, but to interfere in matters where injury to British, not gain to Indian trade, is the chief aim. Further protection is accorded in a series of elaborate clauses against discrimination.¹ A British subject domiciled in the United Kingdom is exempt from the operation of any federal or provincial law² which (a) imposes any restriction on the right of entry into British India; or (b) imposes by reference to place of birth, race, descent, language, religion, domicile, residence or duration of residence, any disability, liability, restriction, or condition in regard to travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business, or profession. But the exemption is conditioned by its suspension in so far as a British subject of Indian domicile is subject to any disability in regard to the same matter imposed on the same ground under the law of the United Kingdom. But the imposition of quarantine regulations and the exclusion or deportation of persons deemed undesirable is not to be deemed a restriction on entry. This provision is so widely worded that it might be misused to provide for the exclusion of almost any person; thus Canada and the Union regard Indians as undesirable citizens on economic grounds. But the governor-general or governor in his discretion in view of grave menace to tranquillity or to combat crimes of violence may suspend the operation of the law for such time as he thinks fit. This, of course, would enable entry to be barred to British communists who might seek to enter India to stir up communal strife.

Discrimination in taxation against British subjects domiciled in the United Kingdom or Burma and against companies incorporated under the laws of the United Kingdom or Burma

¹ Ss. 111-16.

² Including by-laws, etc., issued after the Act.

is forbidden, and it constitutes discrimination if the law would result in heavier payments by persons or companies than if they had been domiciled or incorporated in British India. Registration in Burma under Indian legislation prior to federation is to be deemed incorporation under Burmese law. Companies incorporated in the United Kingdom, their directors, members, shareholders, officers, etc., are to be deemed to comply with any federal or provincial requirements as to place of incorporation, situation of its registered office, or the currency in which its capital is expressed or place of birth, etc., of directors, shareholders, officers, etc. Similarly they are to be entitled to preferential treatment in respect of taxation, but in every case the right is lost if reciprocity is not given in the United Kingdom. Again a British subject domiciled in the United Kingdom is deemed to comply with any conditions as to place of birth, etc., in respect of companies incorporated in India so as to be eligible as director, shareholder, officer, etc., again on condition of reciprocity. British companies are to be entitled to equality of treatment, on the basis of reciprocity, in respect of any grants or subsidies provided by the federation or provinces, but there is an important exception in the case of companies which are not engaged in a branch of trade in India when the system of assistance is started. In these cases the legislature may require that the company be incorporated in British India or a federated state, that not exceeding one-half of the directors are British subjects domiciled in British India or a federated state, and that reasonable facilities are given for the training of British subjects domiciled in India or a federated state.

It is further provided that British ships registered in the United Kingdom shall not be subjected to any discriminatory treatment in respect of the ship, master, officers, crew, passengers, or cargo as compared with ships registered in British India, unless there is like discrimination in any matter against ships registered in British India under the law of the United Kingdom. The same rule applies to aircraft.

These provisions, it will be seen, are complex,¹ and are

¹ Yet obviously imperfect. They do not forbid discrimination by caste or colour; duration of residence is provided for, but not continuity. Cf. Keith, *Letters on Imperial Relations*, 1916-1935, pp. 219 ff.

certainly liable to be regarded as oppressive and unfair restrictions. That it would have been much wiser to regulate the matter by convention was recognized by the Round Table Conference at its first session, and Parliament admitted the force of this view by providing that the operations of the law may be suspended by Order in Council if a convention on a basis of reciprocity is achieved and legislation passed in the United Kingdom and India to give effect to it.

The difficult issue of professional qualifications is dealt with by the rule of the necessity of prior sanction of the governor-general or governor to federal or provincial legislation providing for the laying down of professional or technical qualifications for the exercise of any profession, occupation, trade, or business or the holding of any office in British India. Sanction may not be given unless provision is made to save the rights of any person lawfully engaged in any profession, etc., at the time, unless it is necessary in the public interest to prevent continuance on his part. Moreover, all regulations made under federal or provincial legislation must be published four months before they take effect; representations against them may be made by persons affected within two months, and the governor-general or governor in his individual judgment may disallow the regulations in whole or part. The governor-general may apply this principle to regulations made under any Indian law existing before the new Act takes effect.¹

The position of medical practitioners required careful regulation, because it was essential that the European community should have access to European practitioners if they so desired, and the latter therefore must be assured fair treatment. The British system provides that British subjects of Indian domicile may be registered as qualified practitioners if they hold diplomas granted in India after examination, unless the diploma does not furnish sufficient guarantee of knowledge of and skill for the practice of medicine, surgery, and midwifery, and it is left to the Privy Council to decide any issue as to the value of the diploma. It is therefore provided that, so long as this is the state of affairs in the United Kingdom, British practitioners duly qualified in the United Kingdom shall not be

¹ S. 119.

excluded from practice or registration in British India except on the ground that the diploma held is not adequate proof of knowledge and capacity. Exclusion on such a ground can only be effected if twelve months' notice is given to the governor-general and the authority issuing the diploma, and the Privy Council, if appealed to, holds that the diploma is insufficient evidence. Persons entitled to practise in either country under recognized diplomas must not be differentially treated; this is an enactment for the United Kingdom as well as for India. Provision is made for safeguarding persons domiciled in Burma and entitled to practise in the United Kingdom under British or Burmese qualifications.¹ Finally, any officer on the active list of the Indian Medical Service or any other branch of the forces is *ipso facto* entitled to practise in British India, thus securing their right to attend the civil population.

The legal safeguards are added to by the special responsibility of the governor-general and the governors to prevent in the executive sphere discrimination and by the instructions given to them in case of doubt to reserve Bills which may be discriminatory, though not so in form.

With reference to all these matters of prior sanction it must be noted that the grant of such sanction in no wise fetters the freedom of the governor-general or governor to refuse assent or reserve any Bill, and on the other hand the omission of sanction does not invalidate the Bill if it has duly received the assent, in the case where the governor's sanction was necessary, of the governor, the governor-general, or the Crown, and in the case where the governor-general's sanction was requisite it has received his assent or that of the Crown. The provision is of great importance, since it is clear that it would be vexatious if a measure which had been deliberately assented to were to be ruled invalid on the ground of a technical omission.²

Finally, there must be noted certain miscellaneous restrictions on legislative and executive power. No provincial legislature or government may by reason of its power as to trade and commerce within the province and the production, supply and distribution of commodities prohibit or restrict the entry into

¹ S. 120. See Indian Medical Council Act, 1933, Joint Committee Report, i, 212 ff.

² S. 109.

or export from the province of goods of any description.¹ This is a very far-reaching prohibition and may be compared with the requirement of free trade between the states in the Commonwealth constitution, which has given rise to difficult issues, still unsettled; for instance, how far may the entry of diseased or suspect cattle from another state be checked? Nor may there be discrimination by toll, cess, tax, or due between goods manufactured in or the produce of the province and other goods or between goods manufactured or produced outside the province according to locality.

Further,² no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding, or disposing of property or carrying on any occupation, trade, business or profession in British India. But this prohibition is not to exclude legislation restricting the transfer of agricultural land from a member of an agricultural class to a non-member, or to interfere with rights of members of a community due to personal law, nor does it diminish the obligations of the governor-general or governors with regard to the protection of minorities.

No person³ may be deprived of his property in British India save by authority of law. Laws providing for the acquisition for public purpose of land or any commercial or industrial undertaking or interest therein must specify the compensation or the mode in which it is to be assessed. Prior sanction of the governor-general or governor is requisite to any federal or provincial Bill transferring to public ownership land or modifying rights therein, including revenue rights. In the same spirit⁴ privileges in respect of land granted before January 1st 1870 or for services thereafter and pensions may be taken away or varied only with the assent of the governor-general or governor in his individual judgment. This provision, of course, does not affect the right to forfeit any grant for breach of its conditions, but it is intended to safeguard holders of government grants or pensions against any possibility of vindictive treatment based

¹ S. 297.

² The grounds are limited as compared with s. 111. See s. 298.

³ S. 299.

⁴ S. 300.

on their former services to government. No doubt it is justified *ex majore cautela*. The series of prohibitions take the place of the declaration of fundamental rights for which many Indians asked and which was discussed at the Round Table Conference.

12. THE ADMINISTRATIVE RELATIONS BETWEEN THE FEDERATION AND THE UNITS

The introduction of federation replaces the complete control of the centre over the provinces by a division of authority, and introduces into the federated states the operation of federal executive authority. It is, therefore, expressly provided that the executive authority of the provinces and states and that of the federation shall be exercised so as to secure due respect for the laws of the federation and the interests of the province or state respectively.¹

The governor-general may direct any governor to act as his agent in the province in respect of defence, foreign affairs, or ecclesiastical affairs or of the tribal areas, and in so acting the governor acts in his discretion subject to his instructions.²

Generally³ the governor-general may agree with a provincial government or the ruler of a federated state for the carrying out conditionally or unconditionally of any federal executive function. Moreover, an Act of the federation may impose duties and confer powers on a province or its officers or authorities whether in federal or concurrent subjects, and may similarly impose duties and confer rights on a ruler or officers designated by him in respect of federal matters. In such cases the costs of administration must be paid by the federation, the sum being fixed in default of agreement by an arbitrator named by the Chief Justice of India.

An agreement⁴ may also be made with any state, and must be made if the Instrument of Accession so stipulates, for the administration of a federal law by the ruler, but the governor-general must be empowered, by inspection or otherwise, to satisfy himself that the administration conforms with the federal policy and to give directions to the ruler in case of dissatisfaction. Such agreements must receive judicial notice.

¹ S. 122, Part VI.

² S. 123.

³ S. 124.

⁴ S. 125.

Provincial executive authority must be so used as not to interfere with federal authority, and federal authority extends to giving directions to a province to ensure that end.¹ This is a very striking derogation from provincial autonomy, and as the judge of the necessity of directions is the federation, conflict may result. It is more reasonable that the federation should be authorized to give instructions on matters of the execution of federal laws on certain concurrent issues; as noted above, the previous sanction of the governor-general in his discretion is necessary for legislation to authorize the federation to give such directions. In such cases consultation with the province is obviously desirable, and also in deciding issues as to which legislature should handle concurrent subjects. The federation may also give directions to the province for the construction and maintenance of means of communication of military importance, though it may, of course, itself construct and maintain such communications under its defence power. If the province fails to carry out federal directions a means of compulsion is provided, for the governor-general in his discretion may issue instructions to the governor, who under his special responsibility must then give effect to his orders even against ministers' wishes. But the governor-general, of course, need not give exactly the same directions as the federation proposed, and may use his influence to secure modification. Finally, he has unfettered discretion to give the governor any orders in regard to the maintenance of peace and tranquillity, a power which might be so exercised as to have far-reaching effects on provincial autonomy.

The federation, if it requires land for federal purposes may require the province to acquire the land at federal expense or to transfer government land, the value being fixed in default of agreement by arbitration.²

In the case of the states,³ the executive authority of the state must be so exercised as not to impede the exercise of federal authority under any law, the question of the existence of such authority to be settled on the motion of the federation or the ruler by the federal court. The governor-general after hearing the views of the ruler may issue any directions he thinks

¹ S. 126. See § 10 above.

² S. 127.

³ S. 128.

fit in his discretion, if not satisfied with the executive action of the state. In this case also he is not bound by advice of ministers, but as in the case of directions to the provinces is bound to act on his unbiased opinion. Fortunately the earlier proposal under which in such cases the authority of the representative of the Crown in relation to the states would have been invoked has been dropped in favour of direct action by the governor-general.

The case of broadcasting¹ requires special treatment. Federal control would have been, as in Canada,² desirable, but it was felt that it could not be insisted upon, and the federation may not unreasonably refuse to allow a province or state to construct or use transmitters, or impose fees for their use or the use of receiving apparatus, but it does not concede any power to regulate use of apparatus provided or authorized by the federal government. Functions may be conferred conditionally, including terms of finance, but the matter broadcast by a province or state government may not be subjected to conditions save in so far as they appear to be necessary to enable the governor-general to discharge functions in his discretion or individual judgment, or in respect of peace and tranquillity. Moreover, any issue as to the grant of functions or conditions imposed falls to be decided in his discretion by the governor-general and not by the courts.

In connexion with water-supplies³ the governor-general is given new functions. Under the Act of 1919 water-supplies fell to the province, but the centre had authority in respect of matters affecting the relations of the provinces or of a province and other territory, and any disputes between units on water-supplies were ultimately determined by the secretary of state. Now, if a province or state complains that it is prejudiced by the executive or legislative action or inaction of another unit, it may complain to the governor-general who, if he regards the complaint as serious, shall appoint a commission of experts in irrigation, engineering, administration, finance, and law which shall report. The governor-general then shall decide, unless the province or the state asks for a decision by the King in

¹ S. 129.

² *Radio Communication in Canada, In re*, [1932] A.C. 304.

³ Ss. 130-4, Joint Committee's Report, i, 124, 125.

Council. The decision of either authority shall override any federal, provincial, or state Act. Such a decision may be varied on further application in like manner, and no intervention by the courts is permitted. The governor-general may act similarly in the case of a difficulty affecting a chief commissioner's province. This authority of the government generally may specifically be excluded by any state on accession.

It is contemplated¹ that apart from the federation there may be advantages in inter-provincial and even state co-operation, just as in Canada and Australia alike the provinces and states confer together on issues of common non-federal concern. Power, therefore, is given to the King in Council to set up an Inter-Provincial Council charged with the duty of inquiring into and advising as to inter-provincial disputes; investigating subjects interesting one or more provinces and the federation and one or more provinces, and making recommendations in particular for the better co-ordination of policy and action on any such subject. Representatives of the states may be associated in such a Council.

13. FEDERAL AND PROVINCIAL FINANCIAL RELATIONS

(a) FINANCE

The problem of finance was found of special difficulty by the framers of federation. The government announced that the new system must depend for the period of its inauguration on the fulfilment of conditions making for financial stability, the creation and operation of a Reserve Bank, the balancing of the budget, the provision of reserves, and the attainment of a trade balance.² The joint committee³ was impressed by the difficulty of assigning revenues. It felt that certain provinces were so situated that the sources of revenue available were never likely

¹ S. 135. The governor-general is to be instructed to further federal, state, and provincial co-operation, and the support by the provinces and states of federal agencies.

² Cf. Parl. Paper, Cmd. 4268, p. 17.

³ Report, i, 160-72. See also Report of Federal Finance Committee, March 28th 1932, Cmd. 4069. A commissioner was appointed after the passing of the Act to report on the initiation of federation. See Cmd. 5163 and 5181.

to suffice for a proper scale of expenditure, while the centre was in possession of those sources of revenue which were most apt to expand with the improvement of economic conditions. Inevitably industrialized provinces, Bengal in special, pressed for a further share in the proceeds of income tax. The states raised further difficulties; they had pressed for a share in the steady increase of receipts from customs duties which their subjects had to pay; this could be met by federation which would give them a constitutional voice in fixing charges. But it raised the issue of equality of sacrifice as regards direct taxation, since the states would be opposed to any imposition of such a tax by the federation. They argued that they ought to be exempt from bearing much of the expenditure of the federation—for instance, all that incurred in respect of subsidies to such provinces as might be in deficit. They contended further that the service of the pre-federation debt should be borne by British India, a contention later invalidated by the discovery that the federation would have assets more than equal to its liabilities.¹ They also pointed out that they had special defence burdens in certain cases which the provinces did not share, and that many subjects paid income tax on government securities or as shareholders in companies duly taxed. But, on the other hand, in many cases the states were to continue to draw sums of considerable amount from internal customs duties, levied at the frontier on goods imported from other parts of India, such duties being somewhat akin in many cases to octroi or terminal duties. These were in principle opposed to inter-state free trade as was desirable in a federation, but it was impossible, until new sources of revenue could be found, to deprive the states of this source. There were also in several cases minor sources of revenue which the states intended to retain but which offended against the federal principle.

From the point of view of expenditure, it was argued before the committee that there was much exaggeration in the assertions that federation would greatly add to cost. It was instead estimated that the actual increase would be about one and a half crores attributable in equal proportions to the establishment of provincial autonomy and the federation, in respect of the

¹ Cmd. 4060, p. 20.

increased size of the legislatures and elaboration of machinery of government. This optimistic view was, however, qualified by other considerations. The centre would have to grant substantial subventions to deficit provinces to give them a fair start in autonomy, Burma was to be separated at a loss which might equal three crores minus such duties as might be levied on imports into India thence. When to these duties were added the necessity of increasing the elasticity of provincial finance, it was clear that central resources would be seriously affected. The net result is that the constitution (Part VII) leaves much for later adjustment, but draws the main outlines of a very complex scheme.

I. Duties in respect of succession to property other than agricultural land; stamp duties included in the federal legislative list (on bills of exchange, cheques, promissory notes, bills of lading, letters of credit, insurance policies, proxies and receipts); terminal taxes on goods or passengers carried by railway or air, and taxes on railway fares and freights are levied and collected by the federation. But the net proceeds (except those attributable to chief commissioners' provinces) are distributable among the provinces and federated states in such manner as federal Act prescribes. The federation, however, may impose and retain the proceeds of a surcharge for federal purposes.¹

II. Income tax² (not including in this term corporation tax) is levied and collected by the federation. But a proportion of the net yield (exclusive of sums attributable to chief commissioners' provinces or paid on federal emoluments) fixed by the King in Council is payable to the provinces and states, if any, in which the tax is leviable in manner prescribed by the King in Council. But the federation is safeguarded by the rule that the original proportion cannot be increased. Further, the federation may impose and retain the whole of the proceeds of a surcharge. Moreover, as the financial state is unlikely to permit of the effective operation of this system forthwith, the federation may retain each year for a prescribed period a prescribed amount of the sums payable to the provinces and states; and for a further prescribed period a sum less than that retained in the preceding year by an amount so calculated that

¹ S. 137² S. 138.

the sums to be retained in the last year of the period should be equal to the amount annually deducted. It is forbidden to shorten either of the prescribed periods, and the governor-general in any year of the second period may maintain the sum deducted at the same rate as in the year before, lengthening the period accordingly, but must consult the federation, provinces, and states before action, which is only justified if necessary for financial stability. When a surcharge is contemplated, the governor-general is bound before giving sanction to the introduction of the Bill to satisfy himself that it is imperative, having regard to possible economies and other sources of revenue, including retention of sums normally payable to the provinces.

The duration of the periods and the amount primarily to be assigned to the provinces and states was much discussed. The White Paper contemplated the initial fixing of from 50 to 75 per cent and three years and seven years as the periods prescribed; the joint committee recognized that 50 per cent would be the maximum probable, and that it should be left open to decide the periods and amount later, as is provided in the Act. On Sir O. Niemeyer's advice the percentage was determined in 1936, as fifty per cent, the whole or such amount as, together with general budget receipts from the railways, will make up 18 crores, being retained for a period of five years; thereafter the sum retained will be reduced by one-sixth yearly until it disappears.

When a surcharge is imposed, the Act must impose on federated states which do not pay income tax a charge of such amount as may be prescribed so as to represent as nearly as possible the net proceeds of such surcharge if it were levied. The risk of a surcharge inevitably will make state representatives in the legislature use their full influence to secure that funds shall be found in other ways.

III. The federation levies and retains corporation tax,¹ which is a tax on such part of the income of companies (not being agricultural income) which is not subject to the application of legislation authorizing deduction of the tax from payments of interest or dividends or representing a distribution of profits. But it may not be levied in a state until ten years from federation, and a ruler may demand that instead of

¹ S. 139.

levying the tax a contribution shall be payable equivalent to the net proceeds which such a tax would yield. The auditor-general must be supplied with information necessary for him to calculate the tax, and the federal court is given final authority, without appeal, to determine in any year claims by rulers that the sum fixed is excessive.

IV. Salt duties, federal excise duties, and export duties fall to be levied and collected by the federation. But the whole or part of the proceeds may be distributed to the provinces and states under federal Act. In the case, however, of export duties on jute half of the net proceeds, or a larger proportion as directed by the King in Council, is assigned to the provinces exporting jute in proportion to the amounts grown therein.¹

To safeguard the provinces and states the prior sanction of the governor-general in his discretion is required for the introduction of all Bills varying any tax or duty in which the provinces are interested, or the meaning of agricultural income as defined in the income tax Acts, or affecting the principle on which moneys are distributed to the provinces or states, or imposing federal surcharges.²

V. As regards other sources of taxation no conditions are imposed by law. The federation can impose, in addition to the taxes above mentioned, customs duties, taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies, and taxes on the capital of companies.

The provincial sources of revenue³ in addition to grants from federal taxation include taxes raised by them on land, as land revenue; taxes on land and buildings, hearths and windows; taxes on agricultural income and duties in respect of succession to agricultural land, duties of excise on goods manufactured or produced in the province and countervailing duties on goods produced or manufactured elsewhere in India, being alcoholic liquors for human consumption; opium, Indian hemp, and other narcotic drugs and narcotics; non-narcotic drugs; medicinal and toilet preparations, containing alcohol or any of the above substances, other excises being federal; taxes on mineral rights subject to any federal restrictions imposed in respect of mineral development; capitation taxes; taxes on

¹ S. 140. The percentage fixed in 1936 was 62½ per cent.

² S. 141.

³ Sched. 7, List 2.

professions, trades, callings, and employments; taxes on animals, boats, the sale of goods, advertisements, on luxuries including entertainments, amusements, betting and gambling; cesses on the entry of goods into a local area; dues on passengers and goods carried on inland waterways; tolls; stamp duties in respect of documents not included in the federal list, as enumerated above.

In addition, grants shall be made as determined by the King in Council to such provinces as may be held to be in need of assistance, but such grants cannot, save in the case of the North-West Frontier Province, be increased unless increase is asked for by addresses from both chambers of the legislature. The grants arranged in 1936 are: United Provinces, 25 lakhs for five years; Assam, 30 lakhs; North West Frontier Province, 100 lakhs, to be reconsidered after five years; Orissa, 40 lakhs, with 7 lakhs additional in the first year and 3 in the next four years; and Sind, 110 lakhs in the first year, with 105 lakhs thereafter, gradually diminishing until the grant ceases on the extinction of the Lloyd barrage debt, in about forty-five years' time. Moreover,¹ any taxes, duties, cesses or fees levied by a province or local authority on January 1st 1935, though included in the federal list, remain to the levying authority until provision to the contrary is made by federal Act.

In the case of the states, in order to secure adhesion to the federation rather generous provision is made. The federation² will receive all payments, whether cash contributions or in respect of loans or otherwise, due from the states, and will provide the representative of the Crown with any sums he deems necessary for the performance of his duties towards the states.³ For states that accept federation⁴ the Crown may remit over a period not exceeding twenty years cash contributions payable, and may direct the payment to any state of such sums as it thinks fit if the state has in the past ceded territory in return for the discharge of the state from obligation to render specified military assistance, or for specific military guarantees, provided that the state waives these guarantees. But neither remission nor payment may begin before the provinces have begun to receive payments out of federal

¹ S. 143.² S. 146.³ S. 145.⁴ S. 147; Parl. Paper, Cmd. 4103.

income-tax receipts, and the remission shall be complete before the expiration of twenty years from the state's accession to the federation, or the expiry of the second prescribed period in regard to income tax, whichever first occurs. Moreover, account must be taken in fixing the amount to be remitted or paid of any privilege or immunity enjoyed by the state. Where the state has compounded for contributions, the capital sum shall be repaid in instalments as may be directed. The cash contributions to be remitted are (a) periodical contributions in recognition of the suzerainty of the Crown, including payments for aid from the Crown, or in commutation of the obligation to provide military assistance, or in respect of the maintenance by the Crown of a special force for service in connexion with a state, or in connexion with the maintenance of local military forces or police, or in respect of the expenses of an agent; (b) periodical contributions on the creation or re-grant of a state or on a re-grant or increase of territory; and (c) periodical contributions formerly payable to another state but now payable to the Crown by conquest, assignment or lapse. The privileges and immunities to be reckoned on the other side include (a) those in respect of the levying of sea customs or the production and sale of untaxed salt; (b) sums payable in respect of the surrender of the right to levy internal customs duties, or produce salt or tax salt or other commodities or goods in transit, or sums receivable in lieu of grants of untaxed salt; (c) the annual value of any privilege or territory granted in respect of the abandonment of such rights; (d) privileges in respect of free service stamps or free carriage of government mails; (e) the privilege of entry free from customs duties of goods imported by sea and transported in bond to the state concerned; and (f) the right to issue currency notes. But no regard is to be had to such privileges or immunities if they are to be surrendered on accession, or in the opinion of the Crown should not be regarded. Every Instrument of Accession must contain the necessary particulars to enable the Crown to determine such issues. Any payments to be made under these provisions or any payments hitherto made by the centre or a province are to be charged to the federation or the corresponding province, which in case of doubt is fixed by the governor-general.

The property of the federation is exempted from any

provincial or state taxation, except in so far as it is subject thereto on federation, when it remains subject until otherwise provided by the federation, which may also subject other of its property to taxation.¹ Provincial governments and rulers of states shall not be liable to federal taxation in respect of lands or buildings in British India or income accruing or received there, but the exemption does not apply to the personal property or income of a ruler nor to any business carried on by a ruler in British India or by a provincial government outside the province.²

Both federation and provinces must keep the secretary of state in funds to meet any payments due to be made in respect of federation or province, and in special the secretary of state and the High Commissioner must be enabled to pay pensions.³

Neither federation nor province may place burdens on their revenues except for the purposes of India or some part thereof,⁴ but neither is restricted to grants in respect only of such matters as fall within their legislative competence.

In order to maintain financial stability it was from the first recognized that provision must be made to ensure that the control of currency and credit, including the issue of bank-notes and the maintenance of reserves, must be entrusted to a non-political authority. There were objections to this in India, but in 1934 the Reserve Bank of India Act was duly passed, and the bank started operations in 1935. The capital of the bank is fixed at five crores of rupees in a hundred rupee shares with registers at Bombay, Calcutta, Delhi, Madras, and Rangoon. The Central Board of Directors is composed of the governor and two deputy governors appointed by the governor-general in council, four directors nominated by the same authority, eight elected directors and a government official nominated by the government. Under the constitution⁵ the governor-general is to exercise in his discretion the appointment and removal of the governor and deputy governors, the fixing of their salaries and terms of office; the appointment of an officiating governor or deputy; the supersession of the Central Board and action consequent thereon; and the liquidation of the bank. In nominating directors he is to act in his individual judgment. Moreover,⁶ no Bill affecting currency or coinage or

¹ S. 154.² S. 155.³ S. 157.⁴ S. 150.⁵ S. 152.⁶ S. 153.

the constitution or functions of the Reserve Bank may be introduced save with his sanction in his discretion.

The separation of Burma necessitated the grant of power to the Crown¹ in Council to make arrangements to regulate the monetary system as a result of separation, to give relief on federal taxation in respect of income taxable in Burma, and to regulate in the period immediately following separation the duties to be placed on goods imported into or exported from India or Burma.² To these powers by agreement between the governments effect will in due course be given.

Borrowing³ is permissible both by the federation and the provinces, the amounts to be fixed by Act. The federation may make loans to the provinces or guarantee their loans. Moreover, no province may borrow outside India without federal assent, and such assent is also requisite for borrowing if there is outstanding any part of a central or federal loan or loan guaranteed by the centre or federation, and assent may be made on conditions. But the refusal of assent to borrowing, or to make a loan or guarantee a loan or the reasonableness of conditions imposed in any of these cases falls in case of dispute to be determined by the governor-general in his discretion. His Instructions⁴ require him to bear in mind the general financial policy of the federation, but also the importance of arranging a temporary loan in case of emergency. Federal stock⁵ is given the advantage of the terms of the Colonial Stock Acts and the Treasury conditions under that of 1900 for admission to trustee status are to be deemed to be satisfied until Parliament otherwise directs. These provisions assure the federation and the provinces of reasonable security against disturbance of the money market or injury to the federation from uncontrolled appeals to the market by provinces.

(b) ACCOUNT AND AUDIT

The governor-general and the governors are⁶ given power to make rules in their individual judgment to secure the due

¹ Ss. 158, 159; Parl. Papers, Cmd. 4901, 4902.

² S. 160; Parl. Paper, Cmd. 4985.

⁴ Clause XXIV.

⁵ S. 165

³ Ss. 162, 163, 164.

⁶ S. 151.

payment to the federal or provincial accounts of all receipts, their custody and withdrawal, thus securing the power of personal intervention to assure regularity of accounting. The King¹ is authorized to appoint an auditor-general, whose status is that of a federal judge as regards security of tenure, and whose conditions of appointment may not be varied while he is in office; he is debarred from further office under the Crown in India, so as to secure impartiality. His duties are prescribed by Order in Council or Act, but the previous sanction of the governor-general in his discretion is requisite for the introduction of such an Act. He may act for the provinces, but a provincial legislature not earlier than two years from federation may provide for the appointment on analogous terms of a provincial auditor-general, but the post must not be filled for at least three years after the date of the Act. The auditor-general may give directions as to the mode of keeping accounts; his reports shall be laid before the federal and provincial legislatures as the case may be.² For the home accounts³ of the federation, the railway authority or any province there shall be appointed with like security of tenure an auditor of home accounts, who shall report to the auditor-general or provincial auditor-general if there is one. The auditor of home accounts may be required to act for Burma, in which case Burma will contribute to his salary which, like that of the auditor-general, is charged on the federal revenue, whence also will be paid the cost of his staff.

Payments in respect of the relations of the Crown and the states will be audited by the auditor-general and the auditor of home accounts, the report being made to the secretary of state.⁴

(c) PROPERTY

Provision⁵ is made for the vesting in the Crown for the purposes of a province of property therein used for provincial purposes, and in the Crown for federal purposes or for the exercise of its functions in relation to the states of property which was used—otherwise than under a tenancy agreement with the province for these purposes respectively, while property outside India vests in the Crown for the federation or in His Majesty's government if used by the secretary of state

¹ Ss. 166, 167. ² Ss. 168, 169. ³ S. 170. ⁴ S. 171. ⁵ Ss. 172, 173.

in council. The latter properly falls under the control of the Commissioners of Works, but their disposal is subject to the assent of the governor-general. All other property shall similarly vest according to its use in the Crown for the federation, in respect of state relations, or for the provinces, while arrears of taxes may be recovered by the authority to which the tax is assigned. Property which escheats or lapses or is *bona vacantia* in a province will fall to the province, otherwise to the federation, but property in possession of government will go according to its use at the time it accrued.¹

The executive authority² of federation and province extends to the sale, grant, disposition or mortgage of property and its acquisition and the making of contracts, which are made in the name of the heads of the governments, but no personal liability attaches to them or to the secretary of state in respect thereof nor to any officer executing instruments on behalf of any of them.

(d) SUITS BY AND AGAINST THE CROWN

The federation or province may sue *eo nomine*,³ and be sued in the same cases in which suit was possible against the secretary of state in council, and where claims rise in the United Kingdom service may be effected on the High Commissioner or other representative of the federation, railway board, or province as may be provided by rules of court. Existing contracts are to be deemed made with the federation or province as the subject-matter may be. Liabilities of the secretary of state in council in respect of loans, guarantees, and other financial obligations may be enforced against the secretary of state; they become liabilities of the federation and are charged on the revenues of the federation and provinces alike. Existing or contingent liabilities before federation may be enforced against federation or province as the case may be as well as against the secretary of state; if the latter contracts for federation or province after federation, he may agree that any proceedings may be brought against him. In any case he decides whether federation or province pays, and no imperial liability is accepted. The secretary of state becomes responsible in the same way in

¹ S. 174.

² S. 175.

³ Ss. 176-9.

respect of contracts in respect of the relations of the Crown with the states, and any sums payable or due fall to be credited to or defrayed by the federation.¹

Liability to suit therefore depends in essence in cases not in contract on the previous liability of the secretary of state in council, and that again is determined by that of the East India Company.² Liability in their case rested either on the liability which would have fallen on trading corporations generally or under statute, and did not lie in respect of acts of sovereign authority. Thus it has repeatedly been ruled that acts of state involved in the seizure of territory and of property as matters of sovereign authority could not be dealt with by the courts.

14. THE FEDERAL RAILWAY AUTHORITY

The joint committee³ recommended that the work of the federal government should not include the direct control of railways. The grounds for this view are obvious. Recent experience in Canada had shown the appalling dangers to governmental finance, apart from the risk of corruption, involved in direct governmental authority, and in the Union of South Africa an effort had been made to relieve the government of immediate control. The Act⁴ accordingly gives the duty of regulation, construction, maintenance and operation of railways, including the organization of undertakings ancillary thereto, to the federal railway authority. But the federation remains responsible for securing the safety of members of the public and the operatives, including the holding of inquiries into the causes of accidents to such extent as it thinks it desirable that these functions should be performed by persons independent of the authority.

The tribunal⁵ as to at least three-sevenths of its members and its President is appointed by the governor-general in his discretion. Its members hold office normally for five years, and may be reappointed for like periods, and the governor-general controls their conditions of service and tenure of office. No Bill to vary the provisions of Schedule 8 of the Act in this

¹ S. 180.

² See § 19 below.

³ Report, i, 280-5.

⁴ S. 181, Part VIII.

⁵ S. 182.

regard may be introduced without the prior sanction in his discretion of the governor-general. The authority¹ must act on business principles, with due regard to the interests of agriculture, industry, commerce, and the public, and must take care to meet out of revenue the expenditure charged thereon. Directions on policy may be given by the federation; if there is dispute as to what is policy, the governor-general in his discretion decides. He personally has the right to give directions to the authority on matters affecting his special responsibilities, or matters in which he has to act in his discretion or individual judgment. He may make rules respecting relations between the government and the authority so as to secure that any matter affecting his responsibilities is brought to his notice.²

The authority may not acquire or dispose of land except in accordance with federal regulations, and land to be acquired compulsorily shall be acquired by the government.³ It is a body corporate and can sue and be sued as such in lieu of the government in respect of its contracts, and can enter into agreements with state or other owners of railways in or without India as to terms of operation. Provision is made for a railway fund⁴ to which receipts are to be paid, and for the meeting thence of expenditure of various kinds, any surplus to be shared with the government on the existing basis, or according to a scheme to be prepared. The authority is to be debited on capital account with the total of capital expenditure and to pay interest thereon as well as to repay capital. Its accounts shall be audited by the auditor-general of India.

A railway rates committee⁵ may be appointed to advise the governor-general in case of complaint by users against the rates fixed by the authority, and his recommendation is necessary for any Bill regarding rates which it is desired to propose.

The federation and federated states are bound to afford reasonable facilities for through traffic on the railways for which they are responsible, and no system is to receive unfair discrimination by undue preference or otherwise, and unfair or uneconomic competition is forbidden.⁶ Complaints by the authority or a state fall to be decided by the railway tribunal.

¹ S. 183. ² S. 184. ³ S. 185. ⁴ Ss. 186-90. ⁵ Ss. 191, 192. ⁶ Ss. 195-6.

To it also shall be referred any complaint by a state against a direction by the authority under federal authority as to interchange of traffic, rates, or terminal charges, on the ground that it involves discrimination or imposes an undue burden, and any dispute regarding the desire of the authority or a state to construct a new railway where it is alleged that unfair or uneconomic competition will result. The tribunal is presided over by a judge of the federal court chosen after consulting the chief justice, and holding office for five years, and is completed by two members, chosen by the governor-general in each case from a panel of eight appointed by him being persons of administrative railway or business experience. The tribunal alone has jurisdiction in such cases, and is subject on a point of law only to appeal to the federal court, whence no appeal lies.

Railway companies¹ which have agreements with the secretary of state in council under which arbitration may be claimed will be entitled to be allowed such arbitration as against the secretary of state. Any award will be payable by the federation and due to it by the authority. The authority also may be required to act for the Crown in relation to railway matters in non-federated states, and the powers of the secretary of state in council to appoint directors and deputy directors of companies will vest in the governor-general acting in his discretion after consultation with the authority.

15. DEFENCE

The Act makes no substantial change in matters affecting the vital issue of defence, and most of its provisions affecting that question have already been noted in other connexions. It is a reserved issue, full control over it is given to the governor-general, subject to the secretary of state and the Home Government; and subject to the existence of the commander-in-chief, whose position and emoluments are regulated by the King in Council. The costs of defence, including pay, allowances, pensions, etc., of personnel are charged on the revenues of India, and controlled by the governor-general in his discretion, though he is desired to associate as far as possible the legislature

¹ *See* 197-9.

and ministers with him in dealing with defence requirements, and the legislature may discuss, though not vote on, his estimates for defence. Reference has also been made above to the powers which the governor-general may exercise in civil matters ancillary to defence, whether as regards the federation or, through the governors, the provinces. There exists, therefore, the necessary legal power to secure aid in movements of troops in any contingency and their maintenance at any place.¹

The use of military forces for civil needs is controlled by the governor-general in the ultimate resort. The authority in this regard is purely federal, the subject being excluded specifically from provincial authority. It rests with the governor-general also to secure through the commander-in-chief the due maintenance of the forces' obligations under the civil law and the bringing before civil courts, as in September 1935, for punishment of men guilty of attacks, whether provoked or not, on civilians, a duty stressed by Lord Curzon, who incurred unfair criticism.²

It rests as noted above with the governor-general to decide as to the use of Indian troops outside India, when their employment is desired by the British Government. Payment therefore from Indian revenues can be justified only if the work on which they are employed is for the service of India; otherwise payment must be made by the United Kingdom or other part of the Empire which needs their services. A difficult problem arises as to the validity of the employment of such forces outside India without express parliamentary sanction. But outside the United Kingdom no difficulty would seem to exist regarding their employment as in the past, while it is improbable that their employment within the United Kingdom should occur in such a form as to raise any constitutional issue. The presence of small bodies on ceremonial occasions has raised no discussion. As the commander-in-chief explained on September 17th 1935, it would normally be possible in case of a request for aid from Britain to consult the Assembly before proceeding, since it was desired to carry India with Britain

¹ See § 4 above.

² For the Rangoon episode (1899), see Ronaldshay, ii, 71-3, and that of 1902, 247-9. Under modern conditions of communications the commander-in-chief is far less subordinate to the governor-general than in Dalhousie's time, when obedience was enforced strictly; see *British Government in India*, ii, 205-8; Lee-Warner, i, 193 ff., 211 ff., 328 ff.

in any action, but it might be necessary to act rapidly to safeguard Aden or the oil reserves in Persia. The occasion of this declaration was the dispatch of a small force for the protection of the legation at Addis Ababa in view of the strained relations between Ethiopia and Italy.

The executive authority of the federation extends to the raising of forces naval, military, and air, and the governance of those of His Majesty's forces borne on the Indian establishment.¹ But no person may be enlisted in forces raised in India unless he is a British subject, a native of India, or a native of the territories thereto adjacent, including naturally the vital case of Nepal. Commissions in these forces shall be granted by the Crown except in so far as the power may be delegated to some other person; such commissions may be granted to any person who might be or has been lawfully enrolled therein.² In addition to the post of commander-in-chief, the Crown in Council may require the reservation to itself or some other authority of appointments in the defence forces.³

The secretary of state, with the concurrence of his advisers, may decide what rules affecting the Indian forces as regards conditions of service shall be made only with his approval.⁴ He is bound to hear any appeal which prior to the Act lay to the secretary of state or the secretary of state in council. These provisions apply also to persons not members of the forces but connected with their equipment, administration or otherwise. There is preserved also the rule that in appointments to the British Army regard shall be had as formerly to the selection of sons of military or civil servants of the Crown in India.

Indianization is not mentioned in the Act, but the joint committee and the Instructions⁵ on their advice recognize that the defence of India must to an increasing extent be the concern of the Indian people, and require the governor-general to have regard to this consideration in his administration of defence, and to ascertain the views of ministers on the question of appointing Indian officers to the army and its employment outside India, while in finance the finance minister is to be kept in touch with the control of defence expenditure. The commander-in-chief on February 25th 1935 expressly denied that the strength of

¹ S. 8 (1) (b) and provisos (iii) and (iv).

² S. 234.

³ S. 233.

⁴ *Sa.* 235-9.

⁵ *Clause XVII; Report, i, 100-2.*

the forces in India, the purpose for which it was maintained, or the scale of equipment were dictated by the British Government in imperial interests. Conditions both as regards internal and external dangers were not comparable with those of any Dominion. To reduce as suggested the British element by half, or to regard its number as reducible in view of the increased air strength, was undesirable; other powers found it necessary to maintain ground troops in the same strength as before the war. The successes of Indian troops had been achieved under British officers, and the proportion of troops—three to one in brigades in war conditions—had recently been determined by the British and Indian governments in accord. Indianization had been extended under him from five to fifteen units; when the young Indian officers had had fourteen years' service it would be time to decide if the speed of Indianization could be increased. Defence expenditure had fallen from 55 crores when he took office in four years to 46 crores. In the United Kingdom defence cost 30 rupees per head, in the Dominions from $3\frac{1}{2}$ rupees to 8 rupees, in the United States $18\frac{1}{2}$ rupees, in Japan $6\frac{1}{2}$ rupees, in India $1\frac{1}{2}$ rupees. Later, the Army Secretary pointed out that Indianization of a division would be complete by 1952; that the forces did not include any imperial reserve, and in case of foreign aggression by a great power help would be necessary from England. It was intended gradually to replace British by Indian units, but undue acceleration would involve internal and external danger. The total cost had fallen to 26 per cent of Indian revenues as opposed to 34 per cent before the war. Nevertheless the legislative Assembly by 79 votes to 48 declined to approve the grant under Army Department, which is submitted in order to afford a convenient opportunity of discussion of the cost of defence.

The position of the cadets who come from the Indian Military Academy at Dehra Dun¹ and of entrants to the Indian Air Force² was laid down by the Indian Army (Amendment) Act 1934. The determination was taken to differentiate between these officers and the British officers serving in the

¹ Admission to the British Colleges was at the same time closed in order to secure the best material for Indian service. But good candidates are still hard to find; Sir P. Chetwode, Council of State, September 24th 1935.

² Indian Air Force Act, 1932; the force was constituted on October 8th 1932. Cadets were trained at Cranwell from 1928.

Indian forces by giving the former commissions based on the Canadian model. It was pointed out that only thus would it be possible to create an Indian force subject to an Indian Army Act which could be altered at will by an Indian legislature. It was objected¹ that the Indian commissioned officers would be in a position of inferiority to British officers, since they would not be entitled to take automatically command over units of the British Army in India. But it was pointed out that rules would be made giving the commander-in-chief power to arrange for command in cases of mixed formations, and that in the case of the Dominions their commissions gave no automatic right to command British units, the forces being separate and distinct. Some regret was also expressed at the intention that the new Indian officers should supersede for their units the Viceroy's commissioned officers under the old system. But it was pointed out that these officers belonged essentially to the order of things in which no Indian could attain commissioned rank in the British sense, and that when this was possible the maintenance of the Viceroy's commission became illogical.

The age of entry to the Indian Military Academy at Dehra Dun, which was opened in 1932, as the result of the recommendation of the Round Table Conference of 1931, is eighteen to twenty years; the course of instruction is two and a half years. Sixty vacancies are offered each year; of the thirty available each half-year fifteen are given by open competition, while fifteen are awarded to aspirants from the ranks of the Indian army; ten vacancies are also open to the Indian State Forces for the training of officers for these bodies, a plan devised to secure that there shall be uniformity as far as possible in the training of the state and the regular forces.

The strength of the Indian army in 1935 was relatively small, 60,000 British troops, 150,000 Indian army, with 42,500 reserve, enlistment being for five years at least with the colours, and fifteen years combined colours and reserve service; the Indian Territorial Force, of about 19,000 to serve as a second line to, and a source of reinforcement of, the regular army; the Auxiliary Force, some 33,000 intended to assist in home defence, and consisting of Europeans; and the Indian State Forces,

¹ Debates in Assembly, August 14th-28th; Council of State, September 4th-8th 1934.

about 44,000, when these are placed at the disposal of the Indian government.¹ It is organized in three groups; internal security troops to ensure tranquillity within India during the absence of the field army; covering troops to secure that the concentration and mobilization of the field army is carried out undisturbed; and the field army whose size is limited for financial reasons by the number of troops required for security services. In order to render mobilization possible at short notice and to facilitate the maintenance of the field force, the army service corps has been reorganized, and mechanical transport introduced as widely as possible. Moreover, the manufacture of munitions of war has been encouraged in order to make India self-supporting. That these forces are far from excessive seems conclusively shown by the fact that in September 1935 the hostility of the frontier tribes rendered it necessary to concentrate on the frontier no less than 30,000 men; the necessity of securing the lines of communication in such operations precludes the use of smaller numbers, and the employment of air forces in these cases, however valuable as an auxiliary, is insufficient to secure lasting results.

The position of the Indian navy is not altered in substance by the Act. Its present position was due to the Government of India (Indian Navy) Act, 1927,² which enabled the legislature to place the Indian Marine if it so desired on the same footing towards the British Navy as is a Dominion navy, subject to the power of the governor-general in council, if the former declared that a state of emergency existed, to place at the disposal of the Admiralty any Indian naval forces. It was, however, made clear that, if any forces were placed under Admiralty control, the revenues of India should not, without the consent of both Houses of Parliament, be applicable to defraying the cost, if and so long as they were not employed in Indian naval defence. It was only in 1934 that the necessary action was taken by the legislature in the Indian Navy Discipline Act to apply the Naval Discipline Act to the Indian

¹ Now organized as Class A troops trained on post-war Indian lines, B on pre-war lines, C & militia. The Territorial Force consists of provincial battalions affiliated to regular regiments, liable for general service in emergency, even outside the frontier, urban battalions liable for service in the province, and University training corps.

² 17 & 18 Geo. V, c. 8.

naval forces; action had been delayed by the mistaken supposition¹ that an effort was being made to augment the British force at the cost of India and that the terms of the Washington or London treaties on naval limitation might be evaded. The latter supposition ignored the fact that in these compacts, as in the naval accord with Germany of 1935,² the ratio fixed affects the naval forces of the British Commonwealth. In fact the scheme merely enhances the status of the small naval force³ and ranks it with those of the Dominions. The Act of 1927 is repealed by that of 1935, but its essential provision of legislative power to India is, as has been seen,⁴ retained, and the limitation on the use of Indian revenues remains.⁵ On the other hand, the governor-general may at his discretion⁶ transfer the force to the control of the Admiralty as was done with the Indian Marine in 1914;⁷ in this event Indian funds can be used only if the defence of India is involved, and normally no doubt if time permits the legislature will be consulted as in the case of use of the army or air force.

The prerogative to declare war rests with the Crown, though of course the governor-general may be used as the instrument for the expression of the royal prerogative as contemplated in the Act.⁸ It rests with the Crown on the outbreak of war to regulate trading with the enemy and to permit to such extent as it thinks fit acts of trade. Thus by proclamation of December 14th 1914 certain transactions which were contrary to the royal proclamation of September 9th 1914 (republished in India on October 31st), replacing the proclamation of August 5th 1914 (republished in India on August 7th), were notified. Power to make such exceptions had been delegated

¹ Legislative Assembly, August 7th 1934.

² June 18th; Cmd. 4953.

³ Reorganized in 1928; it carries the white ensign; its strength is five sloops, two patrol boats, a survey ship, commanded by an admiral of the Royal Navy; there are sixty-nine executive, forty-nine engineer officers; one Indian to two British officers was the proportion proposed in 1927-8.

⁴ See § 10 above.

⁵ S. 150 (1). But the absence of British Parliamentary control is unfortunate.

⁶ S. 11 (1).

⁷ Under 47 & 48 Vict., c. 38, s. 6; S.R. & O. 1914, i, 676-81; 1917, p. 384.

⁸ S. 3 (1) (b). For the states he would act under s. 3 (2). The Government of India Act, s. 15, required notification of orders for hostilities to Parliament, and s. 44 restricted the governor-general in council to purely defensive operations against Indian states (as in the Act of 1784). Lord Curzon was repeatedly warned not to take military action unsanctioned; Ronaldshay, ii, 196, 267, 268.

to the governor-general by proclamation of October 8th. Such action was supplemented by Indian legislation by ordinance¹ and Acts, including the Defence of India (Criminal Law Amendment) Act, 1915. All action taken in India was validated by the Imperial Indemnity Act, 1920,² which incidentally overrode the provision of the Government of India Act, 1915,³ authorizing suit against the secretary of state in council in such cases as it would have lain against the Company.

The regulation of prize law and prize courts is one of the few matters which is removed from the competence of the legislatures in India.⁴

The United Kingdom accepts full responsibility for the security of India from foreign aggression by land or sea. India pays £100,000 a year as a slight token of appreciation of naval defence. As regards the army and air force a plea was raised by India before the tribunal appointed to investigate the sums payable from Indian revenues in respect of home charges for British troops in India in favour of a large contribution based on the theory that the army in India was maintained in the interests of the whole Empire and should be paid for in part by the United Kingdom and the Dominions. The tribunal rejected this contention, but on its advice the British Government agreed to pay £1,500,000 a year as a contribution, based on the facts that the army in India was kept ready for war and that it was a source whence forces could be detached for foreign employment (e.g. China and Ethiopia) on short notice, and that India was a training-ground for active service such as could not be found elsewhere in the Empire. The decision was regarded as wholly unsatisfactory by Indian opinion, and criticized by Mr. Churchill as an unjustifiable sacrifice of British interests to conciliate Indian politicians.⁵

¹ Ordinance 6 of 1914; Acts I and XIV of 1915, XVI of 1916.

² 10 & 11 Geo. V, c. 48.

³ S. 32 (2). Such action presumably would not have lain for sovereign acts (see § 19 (e) below).

⁴ S. 110 (b) (i). Any Colonial Court of Admiralty (a term which covers certain Indian courts) may be given authority to sit as a prize court, as was done in the war of 1914-19. See the Prize Courts Act, 1894; the Naval Prize Act, 1864; the Prize Courts (Procedure) Act, 1915, and amendments; *The Chile*, [1914] P. 212. The governor-general is *ex officio* 'Vice-Admiral'.

⁵ House of Commons, March 6th 1934.

16. EXTERNAL AFFAIRS

The control of external affairs rests, as has been seen,¹ with the governor-general acting in his discretion, but from this field are excluded the relations of the federation and the Dominions. The exclusion was necessary, for the treatment of Indian subjects of the Crown in the Dominions had aroused strong feeling in India, and the British Government was presented with the alternative of contending with the Dominions on behalf of India, which had involved it in difficulties with the Dominions without much good accruing to India, or allowing India to stand out as an autonomous unit of the Commonwealth in this regard. The fact that by direct negotiation with the Union of South Africa some advantages had been secured for India was an encouragement to adopt this principle. Nevertheless it was proposed in the White Paper² to preclude India from differential treatment of Dominion British subjects, except in the matter of immigration. This negation of authority fortunately disappeared in the passage of the scheme through Parliament. It is therefore open to India to deal as an equal with the Dominions. In the case of the colonies not enjoying Dominion status the attitude of India is also unfettered by claim of British control. But the British Government as the authority responsible for the colonies and other parts of the Empire has to decide its attitude towards Indian demands, and the Indian government had in 1935 to criticize action taken in Zanzibar with British approval which was regarded as prejudicing the position of Indian merchants therein, and the position in Kenya has not satisfied the Indian government.

In external affairs connected with foreign countries, other than those in immediate proximity to India, the governor-general is subject to the necessity of acting under the directions of the British Government and through its agencies, and Indian policy is necessarily but a part of the wider British policy.³ But in the case of territories in immediate proximity to India,

¹ See § 4 above.

² Parl. Paper, Cmd. 4268, p. 70. Cf. Keith, *Letters on Imperial Relations*, 1916-35 pp. 179, 226.

³ This appears clearly in the Russian accord of 1907, the abortive Persian treaty of 1919, disapproved by Mr. Montagu, and the Turkish issues of 1922, which led to his disappearance from the Cabinet; Ronaldshay, *Lord Curzon*, iii, 215-17, 285.

though relations are formally in the hands of the Foreign Office, as is now the case with Afghanistan and Nepal, and India has no power to appoint diplomatic agents to them, the interests of India are naturally of high importance and British policy is largely based on Indian advice. So the representatives of the British Crown in Afghanistan, in Nepal and Tibet and the consuls in Afghanistan, Persia, Arabia, and Kashgar are normally chosen from the Indian foreign and political department. In general communications even with the League of Nations and the International Labour Organization pass through the India Office, except those on routine matters or relating to the supply of information. Communications regarding the signature or ratification of or adhesion to international conventions are not sent direct. But the governor-general has authority over the British representatives in the Persian Gulf.¹

The Crown retains control of the highest prerogatives regarding external affairs, though it may delegate their exercise under the Act² to the governor-general. Thus the proclamation of neutrality in the case of war emanates from the Crown, as when neutrality was declared in 1911 in the war between Turkey and Italy and in 1912 in the war between Turkey and Greece. The rules observed in India were those prescribed by His Majesty's orders, issued through the Secretary of State for Foreign Affairs to the Secretary of State for India.³

The power to annex territory or to cede territory rests with the Crown subject to any imperial legislation, for it appears that the Act of 1935 perpetuates the restriction of earlier legislation regarding laws affecting the sovereignty of the Crown over any part of British India; the Privy Council seems to have held that the cession of territory by an Act of the Indian legislature would be invalid.⁴

The power to make peace similarly is a prerogative power, which, in the case of the settlement of the war of 1914-19, was accompanied by imperial legislation⁵ in 1919-24 giving power to the Crown to enforce the terms of the treaties. An

¹ e.g., Kuwait Order in Council, 1935.

² S. 3 (1) (b). For the states he acts as representative of the Crown under s. 3 (2).

³ Government of India Notification 1884 G, October 6th 1911; 18, October 25th 1912.

⁴ *Damodhar Gordhan v. Deoram Kanji* (1876), 1 App. Cas. 332. See s. 110 (b) (i).

⁵ 9 & 10 Geo. V, c. 33; 10 & 11 Geo. V, c. 6; 11 & 12 Geo. V, c. 11; 14 & 15 Geo. V,

Order in Council was duly issued for India in respect of each treaty, and local legislation to give effect to the requirements of the treaties regarding ex-enemy property was also passed.¹ In the case of a frontier war the Indian government may be authorized to act, as in its various Afghanistan settlements.²

Since the admission of India to the League of Nations she has been treated in respect of all the great international conventions on the same basis as Canada and the other Dominions and all general treaties therefore are signed separately for India.³ India is subject to the same rules as the other Dominions of communication of its purpose of carrying on negotiations of any kind with foreign states.⁴ When the United States Government proposed to the British Government the conclusion of the pact for the renunciation of war as an instrument of international policy, the British Government insisted that India should be connected with the pact in the same manner as the Dominions,⁵ and it was signed duly for India by Lord Cushendun, who was also a British plenipotentiary. India therefore has been regarded for formal purposes as in the same position as the Dominions, and it is noteworthy that in the Locarno Pact, 1925, India was exempted like the Dominions from liability unless expressly accepted by the government.⁶ The grant of responsibility to the government as opposed to Parliament in the abortive treaty with the United States and France of 1919 for the protection of France was doubtless due to the desire to avoid the necessity of obtaining the approval of the Indian legislature, and a proposal therein to discuss the agreement and its acceptance by India was negated by the governor-general.

The representation of India at the League of Nations Assembly has regularly been carried out by members chosen

¹ Ordinances 1 and 4 of 1920; 1 of 1921. See, e.g., India Treaty of Peace Order, 1920.

² Parl. Paper, Cmd. 324 (1919).

³ e.g., the London treaty of 1930 for naval limitation. The agreement of June 18th 1935 with Germany applies to India and the other Dominions, which assented to signature by the Foreign Secretary. India shared the conference of 1935-6.

⁴ Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 427.

⁵ *Ibid.*, p. 406. It was separately ratified for India.

⁶ Keith, *op. cit.*, pp. xxiv, 358, 366; *Constitutional Law of the British Dominions*, pp. 406, 409. India in the treaties for naval disarmament is treated like the Dominions; Keith, *Speeches and Documents on the British Dominions*, pp. 67 ff., 418 ff. It legislates similarly, Acts VII of 1923, VIII of 1931.

by the Crown¹ to represent both British India and the Indian states.

As regards treaty negotiation, the existing practice² is that while the treaty may be negotiated in India between representatives of the Indian government and those of a foreign power, signature is effected by representatives of His Majesty's government and not by the governor-general, as in the case of the Commercial Agreement with Japan of July 12th 1934.³ The joint committee⁴ contemplates that on the analogy of the procedure in the United Kingdom, where agreements are negotiated through the Foreign Office which consults the Board of Trade, agreements in India should be made by the governor-general, even though as regards the merits of any commercial issue he acts on the advice of a minister. This suggests that it is contemplated that the governor-general should be given power to enter into agreements with foreign countries. Presumably he would act under full powers granted by the King and of course under the complete control in all matters of procedure of the Foreign and India Offices.

As noted above, treaties made on behalf of the federation are subject to limitation by the fact that the federation has no power to legislate on subjects included in the provincial list without the prior assent of the governor of the province, or in like matters for the states without the assent of their rulers. It is of course clear that the Crown can give to the governor-general full power to make any treaty whatever, but no doubt by constitutional practice the exercise of that power will be restricted to cases within federal power or cases in which the provinces or states are either willing to extend federal

¹ Council of State, March 8th 1929; the final control is British, though as often as possible the specific Indian point of view is presented, as on September 13th 1935 by the Aga Khan as regards the failures of the League.

² Sir J. Bhore (Legislative Assembly, January 25th 1934) insisted that India could not enter into a treaty with a foreign power and a treaty could not be signed in India. This is clearly unsound in legal theory: all treaties are entered into by the Crown, which can act through the governor-general, as well as through the Foreign and Indian Secretaries of State. The treaty includes the states so far as desired by the Crown.

³ Parl. Paper, Cmd. 4735. The Burma-Yunnan agreement, April 9th 1935, is made for His Majesty's Government in the United Kingdom and the Government of India.

⁴ Report, i, 102. Legislation, of course, is necessary for all treaties affecting the existing law, giving tariff concessions, etc.

legislative authority or are themselves prepared to pass any necessary legislation.

In respect of conventions arrived at under the procedure of the International Labour Conference it was explained by the secretary of state to the Labour Office on September 28th 1927¹ that it was impracticable to ratify conventions if they were to be regarded as binding the Indian states. The Indian legislature had no power to legislate for Indian states, and it would be impracticable to follow the form of procedure laid down in Article 405 in the treaty of Versailles, 1919. This position has been acquiesced in by the International Labour Conference, but the power of India to apply such conventions more widely will of course arise from the operation of federation. As in the case of the Dominions ratifications of such conventions are expressed by the governor-general in council and not by the Crown.²

While it is apparently not contemplated that the states should be pressed to keep abreast of India in such matters as factory legislation,³ in some matters the necessity of common action is rendered necessary by international considerations. Thus the Convention on the Regulation of Aerial Navigation of October 13th 1919 was signed for the whole of India. To implement it required state action, and the Standing Committee of the Chamber of Princes discussed the issue from 1923 to 1931, when agreement was reached. The sovereignty of the states over the air is admitted, but they agreed to the government of India registering aircraft and pilots, investigating accidents, and inspecting aerodromes and factories. The states may declare prohibited areas after consulting the government of India, and establish customs aerodromes, and reserve local traffic to national aircraft.⁴ Hence it has been possible to pass the Indian Aircraft Act, 1934, and to legislate to enable British India to accede to the Convention of October 19th 1929 for the unification of certain rules relating to carriage by air.

¹ *Labour Office Official Gazette*, November 15th 1927.

² Many proposals have been rejected by Government and legislature as impossible in Indian conditions, e.g., age of employment of children, invalidity, old age, and widows' and orphans' insurance.

³ The Factories Act, 1934, is far in advance of the states; cf. Assembly debates, July 19th 1934.

⁴ Assembly debates, August 7th 1934.

India, like the Dominions,¹ has the power to conclude governmental accords, not in the name of the King, which are not treaties proper. Such accords deal normally with commercial matters or finance, and this form of agreement may be used for matters affecting the French or Portuguese territories in India,² and of course with other parts of the Commonwealth.³

The relations of the federation with the United Kingdom are in part controlled by the British Government directly through the governor-general by reason of his special responsibilities. In matters of fiscal concern they rest on the other hand normally on the free agreement of the legislature with the executive government. Thus the Ottawa agreement of 1932 was accepted by the decision of the legislature, but that of 1935⁴ was rejected by the assembly, and the agreement of 1932 was terminated in 1936 by desire of a small majority of that body.

The governor-general is aided in the performance of his duties by the foreign and political department, which is composed of officers partly selected from the Indian Civil Service, partly from the military forces, and which also advises and aids him in his functions towards the states. This department remains unaltered under the reform scheme.⁵

Since 1927 the Indian government has maintained at Durban an agent-general accredited to the government of the Union of South Africa. He serves to secure co-operation with that government in the policy agreed upon in 1932 of seeking to promote the settlement in some country outside the Union, other than India, of those Indians who desire to leave the Union in deference to the anxiety of the Union to rid herself of any Indians who do not aim at attaining Western standards of life—indeed of all Indians. Moreover, his presence is valuable as enabling Indians to secure his legitimate support in any representations which they may desire to offer to the Union government. The position is of special interest, because it forms a precedent for admitting that the government of one

¹ Imperial Conference, 1923; Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 320 ff.

² e.g., as to Balasore, L. N. Réc. Traités, xxv (1924), pp. 382 f.

³ e.g., with the Union of South Africa, 1927 and 1932.

⁴ Parl. Paper, Cmd. 4779.

⁵ S. 257.

unit of the Commonwealth may properly be represented in another unit for the purpose of defending the interests of those racially connected with it, though they may be born in the Union. Agents are maintained also in Ceylon and Malaya, whither Indian emigration is allowed.

17. ECCLESIASTICAL AFFAIRS

The position of the Church of England in India was vitally changed by the passing of the Indian Church Act, 1927,¹ in order to permit of the separation of the Church of England in India from the English Church of which it had so far been an integral unit. This was supplemented by the Indian Church Measure, 1927, and the Indian Church Statutory Rules, 1929, made by the governor-general in council with the sanction of the secretary of state in council and the concurrence of the bishop of Calcutta. The two churches became distinct from March 1st 1930. Arrangements were made by these measures for the taking over by the new church of property held by the old, and for the possibility of action by the governor-general in the eventuality of the churches ceasing to be in communion. But it is sufficient to note that in all these matters the new Act leaves the governor-general in full authority, in view of his special responsibility for ecclesiastical affairs.

The Act² contemplates the continuance of the system by which a staff of chaplains is maintained for ministrations to Christians of the Churches of England and Scotland in India. Under the new régime chaplains of the former communion must obtain a licence from the bishop of the diocese in which they are to be employed, and must make the declarations required by the Canons and Rules of the Church of India, Burma, and Ceylon. Nominations are made by the secretary of state on the advice of an Indian Chaplaincies Board of the Church of England. In the case of Scotland the Act provides that, so long as establishments are maintained in Bengal, Madras, and Bombay, two chaplains at least must be appointed of the Church of Scotland. They are nominated by the secretary of

¹ 17 & 18 Geo. V, c. 40. There are seven bishoprics. See Chatterton, *History of the Church of England in India* (1924).

² Government of India Act, 1935, s. 269.

state on the recommendation of the General Assembly's Committee on Indian Churches, and must be inducted by the Presbytery of Edinburgh, to whose control they remain subject, subject to the usual appeal to the Provincial Synod of Lothian and Teviotdale and to the General Assembly.

Expenditure on ecclesiastical services is subject to a limit of forty-two lakhs a year, exclusive of pensions.¹

18. THE SERVICES OF THE CROWN

(a) THE RECRUITMENT AND TENURE OF OFFICE OF THE CIVIL SERVICES

The Act provides elaborate safeguards to secure in part that existing civil servants shall not suffer through the political changes more than is inevitable, and in part that future servants shall be recruited under conditions which will as far as possible maintain sound traditions. It provides for the general principle that servants hold at the pleasure of the Crown,² but it safeguards the application of that principle, and it specifically permits for new entrants the inclusion in their contracts of service of provision for compensation in the event of premature abolition of office or retirement not due to misconduct, if the governor-general or governor thinks such a clause necessary to secure a person with special qualifications. It is therefore clear that Parliament has approved the view that relations with civil servants in India can be governed by contract.

A second principle³ enunciated is that no person may be dismissed or reduced in rank unless he is given an opportunity of showing cause against the action proposed, unless he has been convicted of a criminal offence or it is not reasonably practicable to afford such an opportunity. Moreover, dismissal is forbidden by an authority inferior to the appointing authority.

In general⁴ the governor-general or some person authorized by him appoints and makes rules for the conduct of servants

¹ Legislation on these issues is federal; List I, no. 4; for finance see s. 33 (3) (c).

² S. 240 (1), Part. X; *Denning v. Secretary of State* (1920), 37 T.L.R. 139, proves that a contract cannot override the rule.

³ S. 240 (2) (3).

⁴ S. 241.

in the federal sphere, the governors or persons authorized by them in the case of provincial posts. The legislatures may also regulate conditions of service. But, apart from special safeguards for officers serving before the commencement of Part III of the Act, conferring provincial autonomy, the principle is laid down that from any order of punishment or formal censure, interpreting to his detriment any rule of the service, or terminating prematurely his service, an officer must have at least one appeal unless the order be that of the head of the government. Moreover, no rule or Act may deprive the head of the government of the right to deal in the manner which seems to him just and equitable with the case of any person serving in a civil capacity. In the case of the railway services¹ the federal railway authority is given the powers of the governor-general. In recruitment of higher personnel it must consult the public service commission as to the rules to govern its action, but otherwise it is unfettered save that it is bound to bear in mind the claims of the Anglo-Indian community and to obey directions of the governor-general as to proportionate recruitment from the several communities. The claims of Anglo-Indians are also to be considered in framing regulations for the customs, postal, and telegraph services.² The conditions of the police services are to be regulated by special Acts.

The secretary of state³ is to continue to recruit to the Indian Civil Service, the Indian Medical Service (Civil), and the Indian Police, and to any service which he thinks it necessary to establish to aid in carrying out the functions to be performed in his discretion by the governor-general. Particulars of appointment must be laid annually before Parliament. The numbers are determined by the secretary of state. It was found necessary in 1936 to provide for recruitment without examination of European candidates in view of the difficulty of finding sufficient candidates capable of successful competition with Indian candidates at the London examination. The governor-general must report on the operation of the system and may suggest modification. The secretary of state may also fill posts connected with irrigation if he thinks it necessary.

¹ S. 242.

² Government of India Notification, July 6th 1934, indicates the proportions proposed.

³ Ss. 244, 245.

He¹ must make rules determining what posts are to be filled by persons so appointed, and appointments to these reserved posts are to be made in his judgment by the governor-general or governor as the case may be. The conditions² of service of such persons are regulated by the secretary of state so far as he thinks fit; promotions, leave, and suspension require the action of the head of the government in his individual judgment; pay and pensions are charged on the revenues of India, and the secretary of state and the head of the government are given full discretion to deal equitably with any officer. They are permitted to address complaints to the head of the government, and to appeal to the secretary of state against any order of punishment, censure or alteration of conditions of service. The secretary of state may also award compensation to any persons appointed by him whose position is unfavourably affected by the new regime or for any other cause, without prejudice to the right of the head of the government to award compensation in any other cases. These privileges are extended or continued to officers appointed before the new system by the secretary of state in council.³ There are also special provisions protecting from abolition of office members of Central Services I and II, Railway Services I and II, and Provincial Services without assent of the head of the government in his individual judgment, and these officers alone can affect pay or pensions of officers of Central Service I, Railway Service I, or a Provincial Service serving before the Act began.⁴

Normally only a British subject may serve the Crown in India save temporarily in the individual judgment of the head of the government, but the head of the government may open specified posts to rulers or subjects of states or natives of tribal areas or territories adjacent to India, the secretary of state may open posts in his gift to named natives of such areas or territories or subjects of states. Moreover, a ruler or a subject of a federated state is eligible for federal office.⁵ Women are generally eligible, but subject to exclusion of offices by the governor-general, governor, or secretary of state.⁶

As a safeguard⁷ the powers of the secretary of state in these

¹ S. 246.² Ss. 247-9.³ S. 250.⁴ S. 258.⁵ S. 262.⁶ S. 275.⁷ S. 261.

matters are to be exercised with the concurrence of his advisers. Though the services of the staff of the High Commissioner for India and of auditor of Indian home accounts are rendered in England, they are to be deemed services rendered in India, and full protection is given to existing members.¹

(b) THE PUBLIC SERVICE COMMISSIONS

Provision² is made for the establishment of a federal public service commission and for provincial commissions, but two or more provinces may agree that one commission shall serve a group or that all the provinces shall use one commission. By agreement of the governor and the governor-general the federal commission may act for a province. The members are appointed by the head of the government in his discretion, and he determines their tenure of office, and conditions of service and provides for their staff, the cost being charged on the federal or provincial revenues. To ensure impartiality the chairman of the federal commission is debarred from further appointment in India, the chairman of a provincial commission may only act in a like capacity or as head of the federal commission, and any other member can only be appointed to another post with the assent of the head of the government.

The commissions³ shall conduct examinations for appointments to the services, and if asked by two or more provinces the federal commission must aid in the choosing of candidates with special qualifications as for the forest service. Normally they must be consulted on all matters relating to methods of recruitment; on the methods to be followed in making appointments, promotions, and transfers, and on the suitability of applicants; on disciplinary matters affecting any person in a civil capacity; on claims by such a person for payment of costs incurred in defending legal proceedings and for compensation for injuries incurred on duty and the amount of such pension. Exceptions may be made in their discretion by the secretary of state and the governor-general and governors, and no reference need be made on the issue of the award of numbers of posts to different communities, or on questions affecting subordinate

¹ Ss. 251, 252.

² Ss. 264, 265, 268.

³ S. 266.

police officers other than claims for payment of costs or pensions for injuries.

Further functions¹ may be assigned to a commission by Act with the prior sanction of the head of the government, but such powers may not be exercised as regards officers appointed by the secretary of state, military officers, or officers in reserved posts without the consent of the secretary of state, and in the case of a provincial Act affecting persons not members of the provincial services without the assent of the governor-general.

(c) THE PROTECTION OF OFFICERS

In order to prevent unfair pressure on officers, especially those engaged in anti-terrorist work, the permission in his discretion of the head of the government is required before civil or criminal proceedings are taken against any officer in respect of official acts done before the commencement of federation or provincial autonomy as the case may be. Moreover, any case instituted must be dismissed unless the court is satisfied that the acts were not done in good faith, and in that case the federation or province must pay any costs not recovered from the plaintiff.²

In general, officers are to continue to enjoy the protection of s. 197 of the Code of Criminal Procedure and ss. 80-2 of the Code of Civil Procedure, and any authority for prosecutions under the former must be given by the head of the relevant government in his individual judgment. Any Bill to vary the protection given requires the prior sanction of the head of the government. In the case of civil proceedings the head of the government may order that any costs incurred or damages or costs awarded against an officer shall be charged on the relevant revenues.³

(d) PENSIONS

Pensions are secured by being charged on Indian revenues, and, as mentioned above, the governor-general has not only the responsibility but the power to secure payment, if necessary

¹ S. 287.

² S. 270. See § 19 (e) below.

³ S. 271.

by borrowing in the United Kingdom on the security of Indian revenues. Moreover, in addition to persons already in the service of India under the governor-general in council, those who serve in appointments made by the Crown or the secretary of state or serve in reserved posts or in military posts are assured freedom from Indian taxation on pensions if permanently resident outside India.¹

The case of the Indian Military Widows and Orphans Fund, the Superior Services (India) Family Pension Fund, and funds to be formed out of contributions under the Indian Military Service Family Pension Regulations and the Indian Civil Service Family Pension Rules is dealt with by authorizing the King in Council to appoint commissioners to hold and administer these funds.² Pensions thereafter will be payable by the commissioners, to whom the sums to the credit of the funds will be transferred, normally in three years. But any contributor or beneficiary can object, in which case his interest will fall to be treated as part of the revenues of India, and such pensions shall be paid therefrom as the secretary of state directs. No death duty will be payable in respect of any pension derived from the fund.

19. THE JUDICATURE

(a) THE FEDERAL COURT

The system of federation clearly demanded the creation of a federal court which would have jurisdiction over the states as well as the provinces. It was natural to suggest that the opportunity should be taken to create at the same time a court of appeal from all the provinces, whose sole point of unity of control was the distant Privy Council. But there were serious objections to combining the two functions, and the White Paper³ suggested that there should be a Supreme Court to hear appeals beside the federal court. The objections to this proposal were felt by the joint committee,⁴ which pointed out that there might well arise disputes between two distinct courts owing to the difficulty in determining in particular case

¹ S. 272.

³ Cmd. 4268, pp. 33, 77-80.

² S. 273.

⁴ Report, i, 195, 196.

whether a constitutional point was involved or not. It recommended therefore that power should be taken to confer such jurisdiction on the federal court, which would no doubt be divided into two divisions to hear federal issues and appeals. This plan was followed in the Act.

The Act, therefore, provides for the constitution of a federal court to consist of a chief justice of India and such puisne judges as His Majesty thinks necessary, the number not to exceed six until an address is presented by the legislature asking for an increase.¹ Judges are appointed by the Crown and hold office until age sixty-five. A judge may resign or be removed on the ground of misbehaviour or of mental or bodily infirmity if the Privy Council on reference by the Crown so recommends. No power is given of suspension by the governor-general or of removal on the address of the chambers, and the discussion of a judge's judicial conduct by the chambers is forbidden. A judge must have been for at least five years a judge of a high court in British India or a federated state; a barrister or advocate of ten years' standing, or a pleader in a high court or courts of like standing. The chief justice must have fifteen instead of ten years' qualification and must be a barrister, advocate, or pleader or have been one when first appointed a judge. These provisions are intended to exclude members of the Indian Civil Service normally from the highest post, but any judge of the court may be appointed to act during a vacancy of any kind in the office. Judges must take the judicial oath, and their salaries, allowances, leave, and pensions are determined by the King in Council, and (except as regards allowances) may not be varied after appointment to their disadvantage. The court shall sit at Delhi or at such other places as the chief justice with the approval of the governor-general may appoint.

The jurisdiction of the federal court is original and appellate.

I. The court has exclusive original jurisdiction in any dispute between any of the federation, the provinces, and the federated states which involves any question of law or fact on which the existence or extent of a legal right depends. But if a state is a party, the dispute must concern the interpretation of the Act or Order in Council thereunder or the extent of the

¹ Ss. 200-3.

legislative or executive authority vested in the federation by the Instrument of Accession; or arise under an agreement under Part VI of the Act for the administration of a federal law in the state, or otherwise concern some matter in which the federal legislature has power to legislate for the state; or arise under an agreement made after federation with the approval of the representative of the Crown between the state and the federation or a province, and including provision for such jurisdiction. Moreover, no dispute is justiciable if it arises under an agreement expressly excluding such jurisdiction.

In any such case the court shall deliver only a declaratory judgment. But it is, of course, the duty of the parties to conform themselves to such judgment.¹

II. In proceedings in any high court in British India it shall be the duty of the court to give of its own motion a certificate that the case involves a substantial question of law as to the interpretation of the Act or Order in Council thereunder. If this is done, then any party may appeal to the federal court on the ground that the point was wrongly decided, and on any other point on which appeal would have lain without special leave to the Privy Council, and with the leave of the federal court on any other point. In such cases no appeal lies direct to the Privy Council with or without special leave.² The meaning of 'substantial' is presumably that the matter is of considerable public interest or private importance.³

With the previous sanction of the governor-general in his discretion the legislature may provide for appeals from high courts without certificate, but the amount at issue must be 50,000 rupees or such sum not under 15,000 rupees as the Act specifies or the decree must concern property of like value, unless the federal court gives special leave to appeal. It is unfortunate that the high court is not permitted to give such leave. If such provision is made, provision may also be made to cut off direct appeals from high courts to the Privy Council with or without special leave.⁴

III. In the case of state courts, appeal may be brought on the question of the interpretation of the Act or Order in Council

¹ S. 204.

² S. 205.
³ Cf. *Hanuman Prasad v. Bhagwati Prasad* (1902), I.L.R. 24 All. 236.

⁴ S. 206.

thereunder or the extent of the legislative or executive authority of the federation, or on a question which arises under an agreement under Part VI of the Act relating to administration by the state of federal laws. In such cases the mode of procedure is by case stated either by the high court or required to be stated by the federal court.¹

Appeal² lies to the King in Council from the federal court without leave from any decision of the federal court in its original jurisdiction dealing with the interpretation of the Act or Order in Council thereunder, or the extent of legislative or executive jurisdiction of the federation in any state or an agreement made under Part VI of the Act; in any other case leave of the court or the Privy Council is requisite.

It may be assumed that in granting special leave the Privy Council will act on its usual principle and grant leave mainly where some important question of law or matter of public interest is involved,³ and that it will adhere to its principle that it does not act as a normal court of criminal appeal but intervenes only to vindicate the law where there has been a miscarriage of justice by neglect of essential legal principles.⁴

The federal court in allowing an appeal shall indicate the judgment to be substituted and the court below shall give effect to it; it shall also, where it orders costs, transmit the order for payment of the sum ascertained to be due to the court for execution. It may stay execution pending hearing of an appeal on such terms as it thinks fit.⁵ All authorities, civil and judicial, throughout the federation must act in aid of the court, which can make orders for attendance of witnesses, production of documents, and punish contempts which shall be given effect in British India, and any federated state. In the case of the states the court shall act through letters of request to the ruler who shall secure their effect.⁶

The law declared by the court or the Privy Council shall

¹ S. 207.

² S. 208.

³ *Prince v. Gagnon* (1882), 8 App. Cas. 103; *Clergue v. Murray*, [1903] A.C. 521; cf. *Raghunath Prasad Singh v. Partabgash Deputy Commrs.* (1927), L.R. 54 Ind. App. 126; *Jivangiri Guru Chamelgiri v. Gajanan Narayan Patkar* (1926), 50 Bom. 573.

⁴ *Dillet, In re* (1887), 12 App. Cas. 459; *Arnold v. King Emperor*, [1914] A.C. 644; *Mohindar Singh v. King Emperor* (1932), L.R. 59 Ind. App. 233; *Ras Behari Lal v. King Emperor* (1934), 60 Ind. App. 354.

⁵ S. 209.

⁶ S. 210.

bind all courts in British India and state courts in respect to the interpretation of the Act or Order in Council thereunder or any matter with respect to which the federal legislature can bind the state.¹ The governor-general may in his discretion obtain opinions of the court on matters of law of public importance, but it is not stated that such opinions, though delivered in open court, shall have binding effect.²

The court in making pronouncement on such references will follow the analogy of the Privy Council itself, and of the Supreme Court of Canada, as contrasted with the High Court of Australia, which holds that this does not fall within the judicial function. In the case of Northern Ireland advisory opinions of the Privy Council are given binding force.

The court with the approval of the governor-general in his discretion may make rules of court, to determine the rights of practitioners, times of appeal, costs, fees, etc., and may provide for the summary disposal of appeals deemed frivolous or vexatious or dilatory. If its appellate jurisdiction is enlarged by the federal legislature, rules must provide for the constitution of a special division to hear causes which would have been within its jurisdiction without such addition.³

Three judges are made a minimum to decide any cause, and those to sit shall be determined by the chief justice. Judgments are to be delivered in open court with the concurrence of the majority present at the hearing, but minority judgments may be delivered. Apparently it is not intended that members of the majority should express differing views, thus giving the majority view greater weight. But it may be doubted if this compromise between the Privy Council system of a single judgment and the system of the final courts in Canada, Australia, and the United Kingdom of the views of all the judges is specially wise. Proceedings must be in English.

The administrative expenses of the court are charged on the federal revenues, to which fees of court accrue. The governor-general decides in his individual judgment the amount to be included in his financial statement for such expenses.⁴

The state courts to be deemed high courts for the purposes

¹ S. 212.

² S. 213. Cf. Keith, *Constitutional Law of the British Dominions*, p. 309.

³ S. 214.

⁴ S. 216.

of appeals are decided by the Crown and the ruler concerned.¹ The federal court is not given any jurisdiction to hear appeal from high courts when these exercise jurisdiction, usually under the Foreign Jurisdiction Act, 1890, to hear appeals from courts outside India, and nothing in the Act affects any right of appeals with or without special leave to the Privy Council in such causes.²

The arrangements for the jurisdiction of the federal court assure as a rule that any question of the interpretation of the constitution or Orders in Council thereunder shall be finally decided for the provinces by the court subject to appeal to the Privy Council. There is left unprovided for the case where the high court refuses a certificate that such an issue is involved, in which case reference would have to be had to the Privy Council under the existing rules of appeal thither from the high court in question. It might have been desirable to confer on the federal court jurisdiction in all cases affecting the interpretation of federal laws, instead of leaving them to be dealt with by the high courts, on the ground that uniformity of interpretation of such laws was desirable. But of course appellate jurisdiction in such cases can be granted by the federal legislature, and if the federal court had been given original jurisdiction in all such cases, it might have been given too much work. There is, however, the obvious difficulty that as matters stand it may have too little work to do. Moreover, there is given no power to the federal court to correct misinterpretations of federal laws in the state courts, except indirectly to the extent that, if the federal court decides the interpretation of such a law in a provincial cause, its judgment ought in future to guide the state court. It may be doubted if this is at all an effective assurance for uniformity.

(b) THE HIGH COURTS

The status of high court is conferred on the existing courts at Calcutta, Madras, Bombay, Allahabad, Lahore, and Patna, to

¹ S. 217.

² S. 218. High Courts hear appeals from the Court of the Consul-General (Political Resident) for the Persian Gulf, coast and islands (Bombay), and the Kashgar Consular Court (Lahore).

which Nagpur was added in 1936, the chief court in Oudh, the judicial commissioners' courts in the North-West Frontier Province and Sind, any other court constituted or reconstituted as a high court, and any comparable court which may be declared a high court for purposes of the Act by the Crown in Council.¹ Each court consists of a chief justice and such number of judges as may be deemed necessary by the Crown, subject to their not exceeding with additional judges appointed by the governor-general in case of pressure of business the maximum fixed by the Crown in Council, a provision which excludes any possibility of increasing the numbers of the court unduly. Tenure of office is until age sixty, but in other respects as is the case of federal judges. To be qualified as member a person must be a barrister or advocate of at least ten years' standing, or if a member of the Indian Civil Service of that standing have served for at least three years as district judge, have held for at least five years judicial office not inferior to that of subordinate judge or small causes court judge, or have been for at least ten years a pleader of a high court or courts. But to be chief justice of a high court created by Letters Patent any person who was not a barrister, advocate, or pleader when first appointed to judicial office must have served for three years as judge of a high court.² Judges are required to take the judicial oath; their salaries, pensions, and leave are regulated by Order in Council as in the case of federal judges.³ Vacancies pending new appointments or resumption of duties are filled temporarily by the governor-general in his discretion.⁴

The Act abandons the rule that at least one-third of the judges of a high court should be barristers or advocates and at least a third members of the Indian Civil Service, but the joint committee while approving absence of rigidity asserted the importance of maintaining the Indian Civil Service element as source of strength to the courts.⁵ The former provision that such a judge could not be permanent chief justice of a high court has been abandoned for a less drastic exclusion. The joint committee insisted on the importance of securing recruitment of barristers and advocates for the courts. The high

¹ S. 219.² S. 220.³ S. 221.⁴ S. 222.⁵ Report, i, 197, 198.

court at Calcutta, formerly under the control of the central government, is placed by the Act on the same footing as other high courts. The issue was disputed.

The jurisdiction of high courts is continued as before,¹ but it is expressly provided² that every high court shall have superintendence over every court subject to its appellate jurisdiction, and may call for returns, issue general rules of practice and proceedings in such courts, prescribe books and forms to be used, and settle fees for sheriff, attorneys, clerks, and officers. But this power is subject to existing law and the approval of the governor.

An important provision exists to facilitate issues of invalidity of any federal or provincial Act being decided. Where the high court has power to order a transfer of a case from an inferior court, the advocate-general of the federation or the province, as the case may be, may apply for such transfer if the issue of invalidity will arise, and the court shall then order it.³

As before, the high courts have no jurisdiction in matters affecting the revenue or acts done in the collection thereof in accordance with custom or law for the time being in force, until otherwise provided by the federal or provincial legislature, with the previous sanction of the governor-general or governor in his discretion.⁴

Proceedings of the high courts are in English;⁵ their expenses are charged on provincial revenues and fixed in the individual discretion of the governor.⁶

On an address from a provincial legislature the Crown may constitute a high court, or reconstitute such a court or join two high courts. On agreement⁷ of the governments concerned the Crown in Council may extend the jurisdiction of a high court to an area in British India outside the province. Existing arrangements under which a high court serves two provinces or one province and an area outside remain unaffected. The legislature of a province wherein is the chief seat of the court is not empowered to alter its jurisdiction outside the province, but the power to do so rests with the legislature having authority over the area in question. Similarly the power to

¹ S. 223.² S. 224.³ S. 225.⁴ S. 226.⁵ S. 227.⁶ S. 228.⁷ S. 229.

approve rules made by the high court for the area rests with the head of the executive thereover.¹

An interesting survival is the power now given to the governor of Bengal to appoint the sheriff of Calcutta from a panel of three nominated by the high court; he shall hold office at the pleasure of the governor, who in his discretion fixes his remuneration.²

In the case of death sentences in provincial courts, the governor-general is given the powers of the governor-general in council as regards suspension or remission of sentence, and the general power of the Crown or by delegation of the governor-general to grant pardons is expressly reaffirmed.³

The law to be administered in the courts remains unaltered save that the King in Council may make such adaptations as may be desirable to meet the changed conditions consequent on territorial redistributions on the creation of new provinces.⁴

(c) DISTRICT JUDGES AND THE SUBORDINATE JUDICIAL SERVICE

The importance of securing judicial impartiality is recognized by giving to the governor of a province in his individual judgment the appointment, promotion, and posting of district judges, a term which includes additional, joint, and assistant judges, the chief judge of a small causes court, the chief presidency magistrate, and sessions judge, additional and assistant sessions judges. He must consult, before making appointments, the high court, and any person not already in the service of the Crown must have been a barrister, advocate, or pleader for five years and be recommended by the high court.⁵

The joint committee⁶ was emphatic in favour of securing the independence of the subordinate judicial service in view of its close contact with the people, and rules are enacted for that end. The service is defined as consisting exclusively of persons intended to fill civil judicial posts inferior to that of district judge. Rules for entry thereto are to be made by the governor

¹ Ss. 230. 231.

² S. 303.

after consulting the Public Service Commission and the high court. The Commission is to hold such examinations as the governor thinks fit and to prepare lists of qualified persons whence the governor will make appointments, based on such rules as he may lay down regarding the number of posts to be awarded to the several communities. The promotion, posting, and grant of leave to officers shall rest with the high court, but without prejudice to such rights of appeal as officers enjoy under the general principles affecting servants of the Crown as provided in the Act, and mentioned above.¹ The communal character of appointments is inevitable, and the governor's action in this regard will be in his exercise of responsibility for minorities, and in accord with his Instructions.

In the case of criminal proceedings some security is provided by the rule that no recommendation is to be made—presumably by the government to the governor, for the grant of magisterial powers or increase or withdrawal of such powers except after consultation with the district magistrate or the chief presidency magistrate in whose area the person concerned is to work or is working.²

(d) REVENUE COURTS

It is expressly provided that no member of a legislature may be a member of a tribunal which deals with revenue appeals. Where prior to provincial autonomy the governor in council acted in such matters as a court of appeal, the governor-general in council is empowered in his discretion to constitute the court otherwise pending provincial legislation on the matter.³

(e) JUDICIAL CONTROL OF THE EXECUTIVE AND THE RULE OF LAW

Despite the inevitable tendency of government under Indian conditions, having regard to the origin of British power, to be dictatorial, the Courts have definitely asserted their control over the executive. It must, of course, be remembered that

¹ S. 244.

² S. 244.

³ S. 246.

control merely means assertion of legal rights; if the existing law derived from the practice in Indian states before the attainment of sovereignty by the Crown permits high-handed action,¹ that is no breach of the rule of law in the strict sense. But in *Dhackjee Dadajee v. East India Co.*² it was definitely pointed out by the Chief Justice of Bombay that the governor in council had no power to lay aside the ordinary law; office carried with it necessary powers or such as were in practice regularly used, but actions contrary to these principles must be indemnified to be legal. A statutory exception, of course, exists under the Government of India Act,³ which prevents a high court in its original jurisdiction refusing to accept a written order of the governor-general in council as justification of any act done against any person except a European British subject, but this limited exclusion disappears in the new Act. In *Ameer Khan's case*⁴ in 1870 the right to investigate the case of arrest under order of the governor-general in council was denied on the score that it was an act of state, but this plea was rejected, and the arrest found valid simply because of its validity under Bengal Regulation III of 1818, whose existence, providing as it does for detention for reasons of state arising from internal commotions or external causes, negated any general executive authority to imprison without judicial process. Any action of the government under a municipal statute may be investigated in the courts.⁵

Officers of the government therefore are unable to excuse action which is contrary to law by any appeal to the orders of superiors, save in so far as by existing statutes and the new Act the heads of governments are exempt from the jurisdiction of Indian courts.⁶ The liability is personal; the company was never held liable for negligence of police officers or their trespasses,⁷ nor is the secretary of state in council.⁸ No claim can be sustained if a man be arrested and convicted for

¹ *Regina v. Shaik Boodin* (1846), *Perry's Or. Cas.* 435, 459.

² (1843) *Morley's Digest*, ii, 307, 311.

³ S. 111, re-enacting provisions dating from 1781.

⁴ 6 Ben. L.R. 392.

⁵ *Vijaya Ragava v. Secretary of State for India in Council* (1884), 7 Mad. 466.

⁶ Government of India Act, s. 110; Act of 1935, s. 206.

⁷ *Dhackjee Dadajee's case*, *supra*.

⁸ *Shivabhaiji Durgaprasad v. Secretary of State* (1904), I.L.R. 28 Bomb. 314; *Ross v. Secretary of State* (1913), 37 Mad. 55.

embezzlement, for such action is a matter of judicial procedure.¹ Where, however, an official may be liable, he is afforded a considerable measure of protection by statute² for acts done in good faith, and no gazetted officer can be proceeded against without the sanction of the relevant government,³ an important immunity preserved in the Act of 1935.

In certain cases of tortious action by its officers the company and now the government is liable to suit, where no action would lie in England. This is due in some cases to statute, in others to the distinction between the governmental functions of the Crown and its carrying on non-sovereign activities; thus in the case of the *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*,⁴ it was ruled that damages could be claimed for injury done by the negligence of the dockyard officials at Kidderpore. On the other hand, it has been held that the making of roads is a governmental function, so that no action lies for the negligence of public works officers in such construction.⁵ The difference between the two kinds of case is a narrow one.

In matters of contract, officers who contract are not liable, since they are acting for the government, not for themselves.⁶ In India direct suit lies against the secretary of state in council in the courts, and will continue to lie against the government concerned and in certain cases the secretary of state may be sued in England.⁷ Such cases include contracts dealing with land, for though the title to land may rest on sovereignty, that does not affect the attitude of the Crown in contracting in regard to it.⁸ An action may also be brought to recover sums which have reached the hands of the government because improperly levied by a collector of revenue.⁹ There is an

¹ *Mata Prasad v. Secretary of State* (1930), 5 Luck. 157.

² Eggar, *Government of India*, p. 47.

³ Criminal Procedure Code, s. 197.

⁴ (1861), 5 Bom. H.C.R. App. A; *Jehangir M. Cussetji v. Secretary of State* (1902), 27 Bom. 189.

⁵ Wallis, C. J. (1914), 39 Mad. 351. There is much conflict of views. For liability of individuals as a normal rule cf. 46 All. 884 (1924); 51 Bom. 749 (1926); 6 Ran. 263 (1928).

⁶ *Macbeath v. Haldimand* (1786), 1 T.R. 172; *Gidley v. Lord Palmerston* (1822), 3 Brod. v. Bing. 275.

⁷ See § 13 above.

⁸ *Kishen Chand v. Secretary of State* (1881), 3 All. 829; *Forester v. Secretary of State* (1872), L.R. Ind. App. Supp. Vol. 10.

⁹ *Hari Bhanji v. Secretary of State* (1882), 5 Mad. 273.

analogy to cases in which a petition of right may be brought in England for sums which have reached the treasury without due cause.

Apart from these cases, the action of the courts is excluded in respect of those state proceedings which are technically called Acts of State, matters arising out of political relations with foreign states such as treaties or annexations. In 1793 the case of the *Nabob of the Carnatic v. East India Co.*¹ established that no English court would deal with a claim based not on a business contract but on a treaty with a sovereign state, which fell outside municipal jurisdiction. It has equally been held that there is no jurisdiction in respect of claims against the Crown as the successor to a state annexed² or on the score of the annexation.³ When the Punjab was annexed the promise of a pension by the company to the deposed ruler and the taking possession of his property both lay outside the sphere of jurisdiction of the English courts.⁴ On the same principle political dealings with Indian states have been held to lie outside the sphere of the courts, and it has been ruled that the court will not intervene against the action of the Indian government in removing from office the Maharaja of Panna⁵. In the same way the Privy Council has ruled that the jurisdiction exercised by political officers in the Kathiawar states is political and not judicial.⁶

Doubt, it must be admitted, still exists as to the extent to which actions of the Company can be made the subject of legal proceedings. The matter was formerly of greater importance than it now is, for it was laid down in the *Secretary of State v. Moment*⁷ that Indian legislation could not override the right to sue the secretary of state in council in cases in

¹ 1 Ves. Jr. 371; 2 Ves. Jr. 56.

² *East India Co. v. Syed Ally* (1827), 7 Moo. Ind. App. 555; *Doss v. Secretary of State* (1875), L.R. 19 Eq. 509; *Raja Salig Ram v. Secretary of State* (1872), L.R. Ind. App. Supp. Vol. 119.

³ *Elphinstone v. Bedreeshund* (1830), 1 Knapp P.C. 316; *Secretary of State v. Kamachee Boye Sahaba* (1859), 13 Moo. P.C. 22; *Raja of Coorg v. East India Co.* (1860), 29 Beav. 300; *Sirdar Bhagwan Singh v. Secretary of State* (1874), L.R. 2 Ind. App. 38.

⁴ *Salaman v. Secretary of State*, [1906] 1 K.B. 613.

⁵ *Maharajah Madhava Singh v. Secretary of State* (1904), L.R. 31 Ind. App. 239.

⁶ *Hemchand Devchand v. Azam Sakarlal Chhotamlal*, [1906] A.C. 212.

⁷ (1912), 40 Ind. App. 48. Cf. Eggar, *Government of India* (2nd ed.), pp. 17 ff.

which the Company was liable to suit. The matter is now, however, open to regulation by Indian legislation.

It has already been noted that matters affecting the revenue are in such circumstances excluded from the consideration of the ordinary courts and these cases are dealt with under special statutory provisions in the various parts of India.

In general the rule of law is applicable in India subject to those exceptions which have been noted above. While martial law has not seldom been applied in India, in accordance with Indian practice which tends to reduce to writing all general powers, action has usually been authorized by express regulations with legislative authority. Thus Bengal Regulation X of 1804¹ authorized the governor-general in council to suspend the operation of the criminal courts and to establish martial law during the existence of open rebellion. Similar provisions existed in Madras.² The proceedings taken in the rebellion in the Punjab in 1919 were based on the regulation of 1804, martial law being established and trial by court martial directed in the case of the offences against the state specified in the regulation. By Ordinance 1 of 1919 trial by commissioners was substituted, but procedure by court martial powers under the Indian Army Act, 1911, was ordered. In *Bugga v. The King Emperor*³ it was held that it was perfectly legal by ordinance thus to deprive a subject of trial by the ordinary courts. By Ordinance 2 the régime was extended to Gujranwala, by Ordinance 3 the death penalty of the regulations was modified, and by 6 continuation of trials after withdrawal of martial law was provided for. An Indemnity Act, 1919, indemnified officers civil and military for acts done in good faith, and provided for payment of compensation for property taken by them. In 1921 an ordinance provided for the proclamation of martial law in Malabar, and authorized the military commander to make regulations for the restoration of order and to establish summary courts; the Madras high court⁴ construed the powers given strictly, held that the provisions of the Criminal Procedure Code as to police officers were not

¹ Repealed by Act IV of 1922.

² Regulation VII of 1808; Act XI of 1857.

³ (1920), 47 Ind. App. 128.

⁴ 45 Mad. 14 and (1922) 45 Mad. 922.

overridden, that the new courts could sit only in the martial law area to try crimes committed therein, and that the power to issue habeas corpus remained. In 1930 again it was necessary to provide for the exercise of martial law in Peshawar and Sholapur.

In view of terrorism it has been necessary to provide by special legislation for the grant of extraordinary powers of arrest, detention, and trial to supplement the right of detention and deportation which is given by Bengal Regulation III of 1818. This was effected by a large number of ordinances especially from 1930 onwards directed at the non-co-operation movement and the terrorism and oppression of public servants attending it. Part of the substance of these measures was enacted for three years by the central legislature in 1932,¹ but in 1935 the Assembly declined to renew the measure, and it had to be certified by the governor-general. The Press was dealt with by the Indian Press (Emergency Powers) Act, 1931, reinforced by later legislation. The Bengal legislature also passed several Acts without certification,² as the revolutionary activities of terrorists had there excited general dissatisfaction. The measures taken included extended powers of detention without trial, of summary trial, of taking possession of property of associations declared illegal, etc. Severe penalties were imposed for boycotting of recruitment to the services, tampering with the loyalty of the police, spreading false rumours, and on Press publications bringing the administration into contempt, preaching nonpayment of rent or taxes, and similar misdemeanours, for which the security furnished by the printing press responsible may be forfeited. It was found necessary also to legislate in 1930 to defeat the attempts of those accused in the Meerut trial indefinitely to prolong the proceedings, though the measures taken to that end did not secure the result desired. It is clear that the fundamental rights of the liberty of the subject, of freedom of speech, of freedom of assembly and of the Press were subjected to drastic

¹ XXIII of 1932. Cf. Ordinance 10 of 1932.

² Criminal Law Amendment Act, 1925, extended for five years by Act III of 1930 and Act VI. See also Acts XII, XIX, XXII of 1932. Power to detain without trial terrorists outside Bengal is given by the Bengal Criminal Law Supplementary (Extending) Act, 1934, of the Indian legislature, as it is impossible in

restriction, for which the only, though sufficient, defence lies in the existence of organized terrorism which at Chittagong in 1930 (April) and 1932 (September) passed over into deliberate rebellious onslaughts on the government, supplementing assassination in perpetrating which women were pressed into service. It is fair to note that efforts have been consistently made to safeguard persons dealt with under these emergency measures, for example, under Ordinance 1 of 1931 against revolutionary crime in Burma in connexion with the rebellion there, special tribunals were set up and the local government was authorized to issue orders in regard to suspects restricting their movements, or committing them to custody. But such orders had to be submitted for the scrutiny of two judges. Some of the measures were necessary for the protection of Indian states, thus Ordinance 10 of 1931 was issued to prevent assemblies of men intending to proceed from the Punjab into Kashmir in order to create disorder in that state.

The power of the courts to compel the performance of executive functions is limited. By this Specific Relief Act of 1877 the High Courts at Fort William, Madras, Bombay, and Rangoon¹ may require any specific act to be done or forbore by any person holding a public office where such doing or forbearing is under any law for the time being in force clearly incumbent on such person in his public character and the order is applied for by a person whose property, franchise, or personal right is in danger and no other remedy is available. The court will not compel the performance in a particular manner of an act left to the discretion of an officer, but it may compel such discretion to be exercised fairly and in a proper manner.² But no such order can be made³ against the secretary of state in council or any local government. This procedure takes the place of action by mandamus.

It must be noted that under the constitution of 1919 the courts claimed the right to make orders binding the presidents of the legislative councils.⁴ This view was contrary to the

¹ Added by Burma Act XI of 1922. The other courts seem not to have this power; cf. 4 Pat. 224, 229 (1924).

² (1901), 26 Bom. 396; (1903), 28 Bom. 253.

³ S. 45.

⁴ (1924), 51 Cal. 874. An injunction was desired to prevent the submission of a

20. THE HOME GOVERNMENT OF INDIA

(a) THE SECRETARY OF STATE

The authority of the secretary of state in council over India is vested under the Act in the Crown, and is exercised under responsible government on the advice of the secretary of state, who is controlled by constitutional convention by the Cabinet, while the Prime Minister has the right to select the governor-general, and to be consulted as regards other high appointments.

The secretary of state, however, is to be aided by advisers,² with special duties in certain cases. They are to be not less than three or more than six, of whom one half at least must have served for ten years in India and must be appointed within two years of ceasing to work in India. The maximum duration of office is five years, and to prevent staleness reappointment is forbidden, and the secretary of state may remove any member on the score of infirmity of mind or body, a power given for the first time. Payment is due at the rate of £1,350 with £600 a year extra for those of Indian domicile. The secretary of state is at liberty to consult them individually or collectively or to ignore them, and he may act or refuse to act as they advise, except in certain specified matters, namely, those duties conferred as regard the services of the Crown by Part X of the Act as set out above. The advisers may not be members of either House of Parliament, thus reproducing a provision which prevented the employment of Lord Cromer as at one time contemplated by Lord Morley, and ended the services of Lord Inchcape.

The secretary of state's staff is now brought into the normal position of British civil servants, with due saving of existing rights and provision for charging on Indian revenues a part of costs incurred before transfer.³

The stock and money of the secretary of state in council at the Bank of England is transferred to the secretary of state.⁴ Note has already been made⁵ as to the provisions as to contracts

¹ Ss. 41, 87.

² Ss. 278, 279. Cf. my view in 1919, Cmd. 207, pp. 37 ff.

³ Ss. 280-4.

⁴ S. 279.

⁵ See § 13 above.

of the secretary of state in council, and property formerly vested in him. Under these arrangements the India Office falls under the control of the British Government, and arrangements may be made to give the secretary of state full power over its contents, including its valuable library and other possessions.¹

Mention has already been made of the legal liability to which the secretary of state shall continue to be subject² contrary to the otherwise regular exemption of any secretary of state from liability in the courts.

(b) THE KING IN COUNCIL

Mention has already been made of the many cases in which authority is given to the King in Council to regulate matters under the constitution, and in the next section will be noted his constituent power. Moreover,³ a very important power is conferred to cover the period of transition to the new system, including that which must elapse between the operation of provincial autonomy and federation when the central government must operate under new conditions. It is then lawful to provide for modifications in the Act and in the provisions of the Government of India Act still in force; to provide for a limited period that sufficient funds shall be available to all the governments in India and Burma; and to make other temporary provisions to remove difficulties which emerge. But the power cannot be exercised in respect of the transition from the central government to federation more than six months after federation or in other matters more than six months after provincial autonomy.

As regards all Orders in Council, save those referring to appeals to the King in Council or sanctioning proceedings against the governor-general, the representative of the Crown in relation to the states, the governors and the secretary of state, it is provided that a draft must be laid before both Houses of Parliament and an Order can only issue after approval by both Houses with or without amendment. In emergency, if Parliament is dissolved or prorogued or both Houses are

¹ S. 172 (4).

² See §§ 13 (d), 19 (e) above.

³ S. 310.

adjourned for more than fourteen days, the secretary of state may secure the immediate issue of an Order, but it falls unless approved by both Houses with twenty-eight days after the next meeting of the Commons. The control of Parliament is thus ensured, and the House of Lords receives full recognition as of equal concern in this regard with the Commons.¹

(c) THE HIGH COMMISSIONER FOR INDIA

The office of High Commissioner was provided for in the Act of 1919 and established by Order in Council of August 13th 1920. The functions assigned to him were to act as agent of the central government and of the provincial governments and to perform any functions hitherto carried out in the office of the secretary of state which might be assigned to him by that officer. The work undertaken is essentially non-political. Normally all political issues are conducted through the India Office, and the chief use of the High Commissioner in this regard has been in connexion with international conferences where he has been deputed to act as representative of India. In the case of the Ottawa Conference in 1932, however, the exceptional step was taken of making the office of the High Commissioner the centre of the activities of the Indian delegation, which negotiated with the British Government. This exceptional step was based on the desire to emphasize the independence of India in fiscal policy.

In addition to the duty of procuring stores for Indian governments, furnishing trade information and promoting the welfare of Indian trade, the High Commissioner deals with the education in this country of Indian students, and supplies information on India to inquirers.

Under the new régime he will be controlled by the governor-general in his individual judgment, and may be authorized to act for a province, a federated state, or Burma.²

Mention has been made above of the auditor of Indian home accounts³ who is likewise under the control of the governor-general, and by whom the accounts of the High Commissioner are audited.

¹ S. 309.

² S. 302.

³ S. 170 (2), (3).

21. THE AMENDMENT OF THE CONSTITUTION

As was inevitable in the circumstances, the Act confers on the federation no general constituent power, nor does it give any authority to the provinces, such as is enjoyed by the provinces of Canada and the states of the Commonwealth, to mould their own constitutions in detail, within the federal framework. The only power of change is vested in the Imperial Parliament with the exception that in a number of minor points change by the Crown in Council is permitted. These are: (a) Any amendment relating to the size or composition of the chambers of the federal legislature, or to the methods of choosing or to the qualifications of members of that legislature, not being an amendment which would vary the proportion between the number of seats in the Council of State and the number of seats in the Federal Assembly, or would vary, either as regards the Council of State or the Federal Assembly, the proportion between the number of seats allotted to British India and the number of seats allotted to Indian states; (b) any amendment relating to the number of chambers in a provincial legislature, or the size or composition of the chambers, or of either chamber, of a provincial legislature, or to the method of choosing or the qualifications of members of a provincial legislature; (c) any amendment providing that in the case of women literacy shall be substituted for any higher educational qualification standard for the time being required as a qualification for the franchise, or providing that women if duly qualified shall be entered on electoral rolls without any application being made for the purpose by them or on their behalf; and (d) any other amendment of the provisions relating to the qualifications enabling persons to be registered as voters for the purpose of elections.

The procedure is elaborate. Addresses must be passed by the federal or provincial legislature on motions moved in either chamber by a minister on behalf of the Council of Ministers, recommending such amendment; then an address must be passed in like manner asking for the communication of any such resolution to Parliament, and within six months after

such communication the secretary of state must lay before the Houses a statement of the action which it is proposed to take. The governor-general or governor is required to send with the address a statement of his opinion on the proposed amendment, its effect on any minority, the view of that minority, and a statement of the attitude of the majority of that minority's representatives in the legislature, and this must be laid before Parliament. Moreover, no amendment other than one of type (c) from a province may be suggested sooner than ten years from federation or provincial autonomy as the case may be.

The King in Council may make any of the specified amendments at any time and even without any address. But if no address is presented before the draft is laid before Parliament, the secretary of state must take such steps as His Majesty may direct for ascertaining the views of the governments and legislatures affected, of any minority, and the attitude of the majority of the representatives of the minority in the legislature affected. In any case, the provisions of Part II of the first schedule of the Act dealing with the representation of the states is not to be affected without the consent of any ruler affected.¹

The explanation of the powers given, offered on July 3rd 1935, by the government, was the impossibility of foreseeing points of detail as to the franchise or constitution which required amendment, and the undesirability of having to secure an Act for matters of that type; further, any agreement between communities as to the communal award might have to be given effect, without the delay of an Act. It was realized that the Muhammadan community in particular feared any interference with the communal settlement, and it was explained that it was not intended to deal with it save by agreement. It must, however, be admitted that the power to affect it is now given, and that in view of the expressed intention of the government it should have been easy to safeguard from change without consent that part of the constitution.

¹ S. 308.

22. THE TRANSITION TO THE FEDERATION

It is clear that there cannot be immediate provincial autonomy and federation, and accordingly the Act contemplates that after provincial autonomy has been established—from April 1 1937—there shall be a period when the federation will be non-existent.¹ During this time the Indian legislature, as constituted under the Act of 1919, shall exercise the functions of the federal legislature so far as British India is concerned, and executive power such as the federation will possess will vest in the governor-general in council, or in matters under the federation placed in his discretion, in the governor-general, in respect of British India. The governor-general will have special responsibilities similar to those which are provided under federation, but the provisions as to action in his individual judgment will naturally not apply, since responsible government does not exist. But the rules as to prior sanction of legislation, as to broadcasting, as to directions to and principles to be observed by the federal railway authority, and the services recruited by the secretary of state shall have effect in regard to defence, external affairs, ecclesiastical affairs and tribal areas as they have effect in relation to matters in which the governor-general is required by the Act to exercise his discretion.² In all matters the governor-general and the governor-general in council remains subject to the secretary of state, who in questions of the grant or appropriation of revenue of the governor-general in council must have the concurrence of a majority of his advisers who are to number between eight and twelve.³

While this part of the Act is in force, no sterling loans shall be raised by the governor-general in council, but under the authority of Parliament a loan may be raised by the secretary of state, with the concurrence of a majority of his advisers; such loans shall be free from Indian taxation, rank as trustee stocks, and claims in respect of them may be brought against the secretary of state, but without imposing any liability on the British Exchequer.⁴ The Indian legislature is forbidden

¹ Act, Part XIII and Sched. 9.² S. 314.³ S. 313.⁴ S. 316.

to limit the borrowing powers of the governor-general in council.

The federal court, the public service commission, and federal railway authority may be brought into being for purposes connected with British India before federation, either together with or later than provincial autonomy.¹

Subject to these important changes the whole structure of the central government shall remain unaltered pending federation.²

23. THE POSITION OF THE STATES

Reference has already³ been made to the position of the states in regard to federation. But states need not federate, and apart from that there will remain many matters in which the states are not concerned with the federation but have relations with the Crown through his representative.

Under the advice of the Montagu-Chelmsford Report⁴ the relations of the states, formerly often conducted through the local governments, have been in the great majority of cases rendered direct with the governor-general. But the control of the Crown is exercised in most cases through an agent. In immediate political relations with the government of India are Hyderabad, Mysore, Baroda, Jammu and Kashmir, Gwalior, as well as Bhutan and Sikkim, whose connexion is slightly different from that of the ordinary state. The agent of the governor-general in Baluchistan is concerned with relations with Kalat and Las Bela. The Central Indian Agency whose agent resides at Indore with political agents in Bhopal, Bundelkhand, and Malwa, includes twenty-eight major states, marked by the possession of salutes by their rulers, and sixty-nine non-salute states. The Deccan States Agency was formed in 1933 by detaching the states controlled by Bombay; the agent is resident at Kolhapur; there are sixteen other states, mostly small. The Eastern States Agency was created in 1933 by detaching the states in connexion with the Central Provinces,

¹ S. 318.

² S. 317 and Sched. 9.

³ See § 3 above. In the Muslim states, all told, there are only some 3,000,000 Muslims, with 8,000,000 in other states.

⁴ Parl. Paper, Cd. 9109, pp. 247, 248.

Bihar and Orissa. Of the forty states Mayurabhanj, Patna, Bastar, and Kalahandi are the most important; the agent resides at Ranchi with a secretary and political agent at Sambalpur. In the same year the Gujarat States Agency, with eleven greater and seventy non-salute states and estates, was created at the expense of Bombay, the resident at Baroda being made agent; the leading state is Rajpipla, and subordinate to the agency is the Rewa Kantha Agency. In 1923 the states in communication with Madras were detached and formed into the Madras States Agency, including Travancore, where the agent resides, and Cochin. The governor of the North-West Frontier Province is agent for five states, including Chitral. The Punjab States Agency was formed in 1921; it includes fourteen states, the Muslim Bahawalpur and the Sikh Patiala being the more important; in 1933 Khairpur was added. The Rajputana States Agency has its headquarters at Mount Abu, where the agent, the chief commissioner of Ajmer-Merwara, resides; Bikaner and Sirohi are directly under him; the twenty-two others fall under the resident at Jaipur, the resident in Mewar and political agent Southern Rajputana States, the political agent Eastern Rajputana States, and the resident Western Rajputana States. Tonk and Palanpur are under Muslim, Bharatpur and Dholpur under Jat rulers; the others include Udaipur, the premier Rajput State, Jaipur, Jodhpur, and Bikaner. The Western India States Agency was created in 1924, when the states of the Kathiawar, Cutch, and Palanpur Agencies under the Bombay government were placed under the governor-general, Mahi Kantha Agency being added in 1933. The agent resides at Rajkot; under him are political agents for the Sabar Kantha, Western and Eastern Kathiawar Agencies. There are sixteen salute states, including Cutch, Junagadh, Nawanagar, and Bhavnagar, and 236 non-salute states and estates.

There remain in direct relations with local governments a small number of states. Assam is connected with Manipur and sixteen small states of the Khasi and Jaintia hills; Bengal has the states of Cooch Behar and Tripura, whose population is largely mongoloid; the Punjab is connected with eighteen Simla hill states of which Bashahr is the largest and three other

small states. The United Provinces deals with Rampur, Benares, created afresh in 1911, and the Himalayan Tehri-Garhwal.

The governor-general in dealing with the states is aided by the political department, already referred to, which in its work in this respect is subordinate to the governor-general in his capacity as representative of the Crown in its relations with the states. The extent of the authority of the Crown, as we have seen, varies very greatly from state to state.

In these states constitutional government has made very slight progress. Since 1907 there has existed in Mysore a legislative council now consisting of fifty members with an elective majority, in addition to the diwan and the other members of the Maharaja's council. This body has wide legislative and financial powers but has no authority over the executive government.¹ More importance appears in popular opinion to attach to the representative assembly created in 1881 consisting of between 250 and 275 members, though its functions, modelled on the traditional Indian usage, are mainly consultative and interpellative. In Baroda administration is conducted on modern lines by the diwan, who presides over the executive council subject to the control of the Maharaja; for legislation there is a legislative council partly nominated, partly elected. A similar council was established in Kashmir as part of the reforms undertaken in 1933-4. There are councils also in the states of Bhopal, Travancore, and Cochin, and similar institutions in twenty-five other states. On the other hand, it was only under pressure from the British Government that in 1919 Hyderabad set up an executive council of eight members with a view to diminishing the immediate intervention of the Nizam in the affairs of state.² The legislative council established in 1893 contains twenty members in addition to the president, and of these eleven are officials.

In no case is there a state constitution which is binding on the rulers. There are still many instances in which no distinction is made between the privy purse of the rulers and the

¹ Matters affecting the princely family and relations with the Crown, and certain financial issues are reserved.

state revenues, with the result that insufficient consideration has been shown in many states for the needs of the people, but 56 of the 109 princes who are directly represented in the Chamber of Princes have fixed privy purses. In the great majority of states executive and judicial functions are not separated, but thirty-four of these states have made this distinction. In many states the judiciary remains under the complete control of the ruler, but in forty states high courts more or less on British models have come into being, and in some of them no doubt justice is administered with due regard to law. But it must be remembered that the ruler of a state is not subject to law, and that officials acting on his instructions are not normally amenable to the jurisdiction of the courts. There is no system of law definitely laid down in the great majority of the states, a fact which leaves too wide discretion to the executive and the judiciary. There is nothing corresponding to the rule of law as it prevails in British India, and when the Government of India Act was drafted¹ it was found impossible to provide for a statement of fundamental rights since these could not be accepted by the states. Moreover, it must be pointed out that only in forty-six states has there been started a regular graded civil list of officials, though a larger number have established pension funds or provident funds.

With the advance of political rights in British India it is inevitable that the autocracy of the states should become more and more anomalous. The paramount power, having decided that it is proper that the people of British India should be encouraged to exercise political power, cannot logically maintain the view that the Indian states should deny their subjects the right to advance in political status. It seems clear, therefore, that the Crown should endeavour by the use of its authority to secure the gradual extension of political rights to the people.

The states are represented in accordance with the Montagu-Chelmsford scheme in the Chamber of Princes.² Under its constitution³ it is a consultative body, to be consulted freely by the Viceroy in matters relating to the territories of Indian

¹ Joint Committee Report, i, 216.

² Parl. Paper, Cmd. 3568, pp. 88-91.

³ Notification 262 R, February 8th 1921, as amended.

states and in matters affecting these territories jointly with British India or with the rest of the Empire. It has no concern with the internal affairs of individual states or their rulers, or the relations with the Crown, and it interferes in no way with the existing rights of states or their freedom of action. Its constitution is of some interest as marking the distinctions between the classes of states. There are (1) those with full legislative and jurisdictional power; (2) those which have such power partially subject to superintendence, such as the right of intervention in internal affairs, supervision of criminal jurisdiction, in some cases limitation of judicial authority and restriction of the right of legislation or even, as in the case of the Simla hill states, the reservation of residuary rights to the British Government; (3) states with very limited authority, now usually called estates and jagirs. The Chamber consists of 109 princes represented separately, and 12 chosen to represent 127 states of the second class. It must be added that, perhaps naturally, the greater states have shown dislike of thus being ranked with states of minor importance and have not sent representatives to the Chamber. That body, however, has taken advantage of its position to press for preservation and extension of the rights of the states. It has served to enable them to express views on tariff and defence issues, though British Indian legislators have not had a like right to discuss state issues, and it was by it that claims were put forward for the recognition of state rights as regards wireless telegraphy and air transport.

The Chamber took up the proposal for the reduction to regular rules of political practice in issues concerning the states, which had been mooted earlier and had led in September 1919 to the meeting of a codification committee to consider some twenty-three points on which difficulties had arisen, according to replies to an invitation for criticisms addressed to the states. Certain matters had already been taken up and adjusted before it became the business of the standing committee of the Chamber to investigate. Thus by a resolution of August 27th 1917 it was admitted that the government of India was the trustee and custodian of the rights, interests, and traditions of the state during a minority, and that therefore in future

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instead of entrusting control to a political officer—who in the past had often effected important changes during his tenure of office—a council of regency should be established: old traditions should be respected, radical changes avoided, local men employed, treaty rights respected, no jagirs should be granted, no state territories exchanged or sold, and no long-term commercial concessions or monopolies should be given to individuals or companies. In the same way it has been agreed that, where the succession to a ruler is regular, the government does not sanction as formerly the accession, but merely accords it recognition. But the government remains admittedly the necessary arbitrator where the succession is not regular or its regularity is disputed; thus it declined (1925) to permit the late Maharaja of Kashmir to pass over the heir in descent in favour of his adopted son. Accord has also been reached on such issues as the rules affecting the employment of Europeans by the states; the settlement of boundary disputes, and the payment of compensation to the states for land taken for irrigation, navigation, and other purposes.

The right, however, of the Crown in the exercise of paramount power to determine the extent of its sovereignty, asserted at Bahawalpur by Lord Curzon,¹ was reasserted in the most conclusive terms in 1926 by Lord Reading² when he closed the controversy over Berar with the Nizam and stands unaltered; the way for the rulers to acquire authority is through federation. It has remained necessary to intervene with decisive authority in state affairs. The Nizam was reminded of the desirability of orderly administration and pressed to employ British officers to bring order into the administration of the state under the executive council system.³ The Maharana of Udaipur was required after a rising against his government in 1921 to rectify causes of complaint and to delegate power to his son.⁴ It has been necessary to secure the absence from his state of the ruler of Alwar and to place a British officer in charge temporarily (1933). In 1926 the murder of a British Indian

¹ Curzon in India, p. 226; cf. p. 228.

² Parl. Paper, Cmd. 3302, pp. 56-8, reaffirmed by the Indian States Committee (ibid., pp. 18, 19).

³ Barton, *The Princes of India*, p. 210.

⁴ Barton, p. 94. Jaipur also was in need of a British administrator (p. 96).

merchant in Bombay was alleged to have been instigated by the ruler of Indore, who was therefore offered an impartial commission of inquiry on the lines suggested by the Montagu-Chelmsford Report as the best means of deciding issues of this kind through effective investigation.¹ Declining to face such investigation, he resigned in favour of his son. In 1922 the nawab of Nabha was found by the investigation of a special commissioner to have used the judicial machinery of his state to secure illegal convictions against subjects and officials of Patiala, with the deliberate intention of injuring a neighbouring state; he was permitted, with some hesitation, to abdicate,² but in 1928 on charges of disloyalty and seditious associations he was removed to Kodaikanal and placed under restraint. Prolonged absence from the state has occasioned the necessity of relieving the ruler of Dewas (senior) from the administration of his territory.

The position of the states in matters of titles has been recently made more clear. The government has no objection in principle to rulers of the states bestowing on their subjects titles which the British Government does not bestow, but it objects to their grant to British subjects, though in some cases it appears that recognition has not been wholly refused. The rulers of Baroda, Gwalior, Mysore, and other states have orders of chivalry, which may be worn after those conferred by the Crown. On the other hand, rulers receive membership of the British Orders of the Star of India or the Indian Empire, the omission of the ruler of Nabha being regarded as a signal mark of royal displeasure. They may not accept without permission any foreign title. They may not assume any new Indian title without recognition. The style of the heir-apparent is normally adopted from Indian usage; permission has been given for the adoption of new styles in certain cases. The Crown confines the term 'Highness' to the reigning head of the state and his wife; only in exceptional cases is it accorded to the heir-apparent as in Mysore. The term 'Prince' is recognized only of the rulers, and of the Prince of Arcot and the son of the last King of Oudh. The Indian princes are not royalty, nor their

¹ Parl. Paper. Cmd. 9109. s. 309.

families royal, but ruling families. Their salutes and precedence are determined by the Crown.¹

Apart from these vital questions of status, the princes have largely by assent been brought into economic relations of a close kind with the British Crown. The attainment of direct rule in 1858 was the prelude to the systematic bringing of the states into the railway planning of the period. The states were induced to provide land, and sometimes materials, to surrender jurisdiction, and transit duties, in some cases even to lend money, to further construction of lines which remained under British control; they gained no doubt from facilities for trade though the routes followed and rates imposed may have been chosen for reasons of military convenience and the interests of British India. The right to construct new railways in the states has naturally been subject to British intervention² in order to prevent competition with the established lines, a fact which explains the terms of the railway section of the new constitution.

Certain rights with regard to railways are granted to Jodhpur, Bikaner, and Hyderabad, and Kashmir and Cutch are not included in the general railway system. Military considerations are of course sufficient to justify this claim of control.

Telegraph lines, telephone system, and postal arrangements have been established by the government of India. Telegraphs being essential for military purposes are under the government of India in all cases, though certain privileges are accorded to states where offices are established. Kashmir alone has a separate system, but the British Indian system also operates in this state. It has been agreed in 1924 as a result of negotiations that states may construct internal telegraph lines, but special arrangements are requisite for connexion with the Indian system. The same principle has been applied to telephones.³

In most states the Indian government has introduced its postal system. In Gwalior, Patiala, Jind, and Nabha there is a system based on a postal convention under which letters posted in the state post offices are carried throughout India. In other states the Indian post office has exclusive rights in respect of

¹ Panikkar, *Indian States*, pp. 68-72.

² Agreement on principles was reached in 1923.

³ Parl. Paper, Cmd. 3302, p. 49.

All-India mail services, and only ten states, of which Hyderabad, Travancore, and Cochin are the most important, have the right of internal services. The states are also required to pay compensation in respect of robbery of mails within state territory,¹ a subject which has raised protests when the robberies have not been caused by lack of care in the state.

As regards customs duty British authority has extended mainly to seaborne trade, the states² being permitted to levy land customs and transit duties. Special arrangements have been made with the maritime states of Travancore and Cochin, under which Indian import duties are enforced in the port of Cochin and proceeds are shared. Certain minor states³ levy import duties on seaborne goods, but the government of India claims a refund of duties in respect of such goods consumed in British territory, but it has not conceded the claims of states to be paid sums in respect of imports consumed in the states. Here again federation is proposed to meet the difficulty. Kashmir, however, not only levies its own customs duties but under a treaty of 1870 receives duties collected at British Indian ports on goods imported into the state in bond. The duties charged by Hyderabad are controlled by treaty.

In currency matters the British rupee has become everywhere legal tender, the process being assisted by the work of the Presidency Banks and the Imperial Bank of India. Hyderabad has its own rupee and has issued since the war currency notes. Travancore keeps accounts in its own rupee and coins half and quarter silver rupees. In Rajputana each state has its own rupee, a most inconvenient position, which justifies the action taken during minorities in the states of Alwar (1905) and Bikaner (1898) to introduce British coins. The government discourages the state mints, restricting them as far as possible to the state capital and to the production of sufficient coinage only to meet the needs of the state.

In the vital matter of salt British policy has succeeded in securing control of the production even in the states and the

¹ Rules of 1866, revised in 1885; condemned by the States Committee (p. 50).

² Mysore is the chief exception.

³ Bhavnagar is a free port and keeps customs even on goods passed into British India.

fixing of a regular price, determined by the government, which depends on the duty charged.¹

In a similar manner considerable success was attained in establishing monopoly in opium. In 1907 a convention with China provided for the closing of that market to Indian opium, and the states, though they were not consulted regarding the treaty, are of course bound by its terms.

In all these matters the Indian States Committee of 1928-9² found that the state had no serious grievances to be remedied, insisting that the states could not expect British India which suffered severely from the opium policy, to recompense them for a common sacrifice in international moral interests, while uniform currency was a boon to all concerned, and only confusion could arise from reopening the old treaties regulating salt production. But federation no doubt renders it fair to consider the claims of states which pay tribute or have ceded lands for protection and which would in federation be paying twice over for security.³ Hyderabad, however, prefers to insist on her treaty rights for the maintenance in her borders of a British force.

The states have been brought into inextricable relations of unity with British India by the establishment, through roads, railways, posts, telegraphs, telephone, and wireless systems, of through communications. They have interests in British Indian currency and banking, and are vitally affected by the development of Indian industrialism and by the growth of oversea commerce. Tariff policy affects them deeply. All these factors operate in much the same way on all the states and help to create in their rulers the sense of common interests which rendered possible the creation and partial operation of the Chamber of Princes. In like manner their subjects have ceased to feel so intense a personal loyalty and have begun to conceive of themselves as Indian citizens, an idea which the Round Table Conference mooted but without reaching agreement on its practicability. The influence of the Press and the

¹ Travancore and Kathiawar do not pay salt duty. The value of immunities now is forty-six lakhs.

² Cmd. 3302, pp. 48, 50. Cmd. 4103 is more favourable to state claims, no doubt in the desire to promote federation, the concessions deemed just being made conditional on federation, a position naturally criticized as illogical.

³ e.g., Mysore, Baroda, Gwalior; Barton, *The Princes of India*, pp. 301, 302.

universities has propagated demands for a minimum of rights. The Indian National Congress has recognized the unity of India by permitting Congress organization in the states; those connected with Madras and Mysore have such organizations to send representatives to Congress. The States' Peoples' Conference¹ represents the doctrine of the common interests of the peoples of the states as against their rulers, and it is in vain that the Maharaja of Bikaner contends that the Conference is in principle unconstitutional and illegal, and that at most the people of each state may organize to make suggestions to the ruler.⁶ But the essential fact of unity must prevail, and the demands put forward by the spokesmen of the people, though doubtless in advance of the great majority of those concerned, are all of an easily defended nature. They demand a share in legislation and taxation; the fixing at a reasonable sum of the privy purse of the ruler; the enactment of a code of law with securities for person² and property, administered by a judiciary independent of the executive; the declaration of fundamental rights of freedom of speech, of the Press, and of the right to engage in political agitation; they ask that the state representatives to any federal legislature should be elected; they desire to see the civil services placed on a definite footing with proper security of tenure, and their subjection to independent judicial control.³ Some urge that the states should co-operate with British India in dealing with the appalling evils of child marriage, instead of affording facilities for evasion of the Sarda Act.

¹ For other organizations, etc., see D. V. Gundappa, *The States and their People in the Indian Constitution* (1931).

² Domestic slavery still lingers; Barton, *The Princes of India*, p. 69. See also the case of a subject of the ruler of Sirohi imprisoned in a bungalow; Bombay High Court, June 22nd 1935.

³ Protection against the organization of activities in British India directed against state authority or mass movements into a state is given by the Indian States (Protection) Act, 1934, which also imposes penalties on Press statements exciting hatred, contempt, or disaffection for state administrations, though statements of fact are allowed. The Act dangerously limits criticism of maladministration. It must be admitted that the very necessary reforms in Kashmir were compelled by action in British India. Unfortunately there has been blackmailing of states.

24. BRITISH BURMA

The separation of Burma from India involves the creation of a distinctive constitution,¹ which is based on combining in the hands of the governor the powers of the governor-general and of the governors of the provinces, so far as is practicable, and in all matters of legislative concern giving the full authority of the federal and provincial legislatures to the Burmese legislature. There is, of course, as a result a constitution of a very remarkable type, presenting the possibility of the rise of effective responsible government in a manner without parallel in India. The provinces there are of restricted power, while the federation is shut out from many vital activities deeply affecting the life of the people, and the unity of its legislature is seriously lessened by the fact that it represents the nominees of autocratic rulers who disbelieve in democracy and the elected representatives of British India. In Burma the majority of the legislature is Burmese, so that, if it is desired, there is the possibility of a strong and united party, which is the necessary presupposition of responsible government. Moreover, there is nothing parallel to the weight of conservatism lent to the federal legislature by the states, though the power of the governor to nominate half the second chamber will doubtless be used to secure some measure of conservative support to a government which may tend to fall under the control of the majority in the lower house in an inconvenient degree.

In the main the constitution is a transcript from that of the federation and provinces, but the governor, who is normally to act on the advice of his council of ministers not exceeding ten in number,² is to act in his discretion with the aid of three counsellors in matters of defence, external affairs, other than relations with other parts of the dominions of the Crown, ecclesiastical affairs, the control of monetary policy, currency and coinage, certain areas including the Shan states, and areas in Burma which are not British territory,³ Burma denoting those parts of India east of Bengal, Manipur, and areas attached to Assam. His special responsibilities⁴ included

¹ Act, Part XIV, reprinted as Government of Burma Act, 1935. See Joint Committee Report, i, 245 ff., 381 ff.; ii, 1 ff.

² S. 5.

³ S. 7.

⁴ S. 8.

prevention of grave menace to peace or tranquillity; the safeguarding of the financial stability and credit of Burma; the safeguarding of the legitimate interests of minorities; the securing to and to the dependants of members of the public services of the rights accorded by the Act and the safeguarding of their legitimate interests; the securing in the executive sphere of the prevention of discrimination; the preventing of discriminatory treatment or penalization of goods imported from the United Kingdom and India; the securing of the peace and government of certain areas specified in the Act,¹ and the securing that the due discharge of functions in respect of which he is to act in discretion or individual judgment is not prejudiced by action taken in other matters. He has to aid him a financial adviser and an advocate-general, and is required to exercise the same powers as in India in respect of police rules, the prevention of crimes of violence, and the safeguarding of information, and to make rules securing that ministers and secretaries give him information where any special responsibility may be involved.

The legislature in which the governor represents the King is composed of a Senate, half of whose members are nominated by the governor, half elected by the House of Representatives on the system of proportional representation.² Senators are qualified by a high property qualification or by ministerial or official service or other public service. Its duration is seven years, but it may be dissolved either with the lower house or by itself. The House of Representatives, which lasts for five years, consists of 132 members; there are 91 general non-communal seats, 12 Karen seats; 8 Indian,³ 2 Anglo-Burman, and 3 European seats; 11 for representatives of commerce and industry, one for the university, and two each for Indian and non-Indian labour. The franchise is given at age eighteen, and is based on property, taxation, rent payment, and other qualifications wider than those in India, resulting it is anticipated in a wide representation.

The powers of the governor, the organization of the houses,

¹ Sched. 2, Part II.

² S. 17 and Sched. 3.

³ i.e., persons born or domiciled in India, or whose fathers or grandfathers were so born or domiciled.

privileges, pay, and so forth follow the lines indicated; there is close similarity in the disqualifications of members, and the general rules of procedure. The legislature is given extra-territorial authority in respect of British subjects and subjects of the Crown in any part of Burma; of British subjects domiciled in Burma wherever they are; of ships and aircraft and persons on them, if registered in Burma; and of the personnel of naval, military, and air forces raised in Burma and their followers.¹ The rules of legislative procedure follow the Indian model; the governor's prior assent is required in like cases, differences of view are solved after twelve months normally by joint sittings; Bills may be assented to, reserved, or refused assent. The governor² may promulgate ordinances at the instance of ministers, or in certain cases on his own motion, and may enact permanent Acts; moreover, for the scheduled areas he may make regulations,³ and no Act applies save in so far as he makes it effective with or without modifications. He may also, if the constitutional machinery breaks down, take over the administration, subject to approval by Parliament, but the period shall not exceed three years.⁴

The financial provisions follow the Indian model.⁵ Grants are the concern of the House of Representatives only, and the governor has the same power of restoring grants that exists in India, while similar exceptions from the necessity of voting grants are provided. Audit is entrusted to an auditor-general, but home accounts may be audited by the auditor of Indian home accounts.

Provision is made for a Burma railway board, and a rates committee may be appointed, but there is no provision for a tribunal, as the issues involved in India do not arise for Burma.⁶

The provisions regarding the high court are as in India. A new appeal is accorded to the Privy Council on the interpretation of the Act or any Order in Council under it.⁷

The services of the Crown are protected as in India. The secretary of state shall recruit for the Burma civil service (Class I), the Burma police (Class I), any Burma medical service,

¹ S. 33² Ss. 41-3.³ S. 40.⁴ S. 139.⁵ Ss. 55-67.⁶ Ss. 69-80.⁷ Ss. 81-90.

and if necessary for irrigation. The security of the subordinate judiciary is provided for, and the governor is given full discretion to appoint a Burma frontier service, which is normally exempt from control by the legislature. A public service commission is provided for, and security against unfair prosecutions, and as to pensions and other matters are regulated as in India. The appointment of chaplains is authorized. Only British subjects are normally eligible to serve the Crown, but the governor may extend eligibility to areas in Burma, and to natives of specified Indian states or territories adjacent to India. Sex is not generally to disqualify.¹

Lands and buildings held in Burma for the purposes of the government of India now fall to the Crown in Burma, as does other property, excluding property held for the Indian forces stationed in Burma, not being raised in Burma. Contracts pass to the government of Burma which is made able to sue and be sued, while liabilities of the secretary of state in council may be enforced against the secretary of state.² The secretary of state is to be advised by not more than three advisers on conditions similar to those in respect of India, but only one adviser need have had ten years' service in Burma.³

As in the case of India, there are restrictions⁴ on the power of the legislature, including restrictions⁵ to prevent discrimination against the United Kingdom; there is a prohibition of discrimination on grounds of religion, etc.;⁶ property if taken must be paid for, and pensions and grants are safeguarded.⁷ The existing law is to continue subject to adjustments by Order in Council.⁸ The governor is to be immune from legal process while in office, and a like immunity is accorded to the secretary of state, and after leaving office only by permission of the King in Council may proceedings be taken for official actions.⁹ A High Commissioner for Burma may be appointed if desired.¹⁰

There is no general power to amend the constitution. On a procedure¹¹ similar to that in India after ten years amendments may be asked for by the legislature as regards the composition of the legislature, or the method of choosing or the qualification of members, or the franchise, and at any time amendments may

¹ Ss. 91-129.² Ss. 130-3.³ S. 140.⁴ S. 34.⁵ Ss. 44-54.⁶ S. 144.⁷ Ss. 145, 146.⁸ Ss. 149, 157.⁹ S. 152.¹⁰ S. 150.¹¹ S. 154.

be made by Order in Council after due consultation of the government, the legislature, any minority, and after ascertaining the views of the majority of the representatives of the minority in the legislature.

The procedure by Order in Council is subject to the control of Parliament,¹ and there is power to make adjustments by Order in Council within six months after the coming into force of the constitution.²

As in India, there is power to remove partially exempted areas from that category and to place exempted areas into the category of partially exempted areas.³

The problem presented by the states in India is unknown in effect in Burma, for the only substantial non-British area is presented by the Karenni states, and they are of negligible proportions. One further area is non-British, the Namwan Assigned Area, which is held on perpetual lease from China in order to facilitate border transit. It is sufficient in their case to treat them on the model of excluded areas, but as they are not British territory, they have to be dealt with on the procedure of the Foreign Jurisdiction Act, 1890.

An exceptional position is occupied by the federated Shan states which are British territory but which are governed by their own chiefs with full powers. The governor acts in his discretion in relation to these states, and until otherwise provided by the King in Council he will continue to control the Federal Fund of this state. The King by Order in Council may require contributions to be made to the fund by the states; may require payments representing the share of the receipts of the Burmese government accruing on account of the states to be made from Burmese funds to the Federal Fund; may require payments to be made to Burmese revenues from the fund, representing the proper share of the states in the general expenses of Burma, and may make such other provisions as he thinks fit in respect of the fund.⁴ Only the payments from and to Burmese revenue shall be brought before the Burma legislature. The accounts of the fund shall be kept as directed by the auditor-general of Burma, by whom they are audited.

The separation of Burma involves the allocation as between

¹ S. 157.

² S. 156.

³ S. 155.

⁴ S. 68.

India and Burma of responsibility for Indian debt. An advisory tribunal recommended that as a general principle the proper ratio in which Burma should contribute in respect of the liabilities outstanding at the date of separation should be 7·5 per cent.¹ The King in Council is authorized to require payments from Burmese revenues of such sums as he may judge fit.²

The question of currency falls to be regulated by Order in Council,³ but it has been agreed between the two governments that for a period of at least three years after separation the currency and exchange shall continue to be managed by the Reserve Bank of India and the currency system of the two countries will remain unified. Provision, however, is made for the issue of distinctive bank-notes for Burma in order to facilitate the adjustments consequent on the joint use of the Reserve Bank, and a local coinage of different design from the Indian may, if desired, be introduced in Burma.⁴

Power also is given to regulate by Order in Council the customs duties to be levied on trade between India and Burma.⁵ It has been agreed⁶ that in general Indian goods shall enter Burma duty free and without restriction, subject to the power to levy countervailing duties corresponding to excise duties. Special arrangements are provided as to similarity of treatment of goods imported from other countries. The agreement is to operate for three years after separation subject to termination by notice of twelve months. Immigration⁷ likewise is to be continued for three years on the existing basis and is not subject to any restrictions other than those of general application in the interests of public health and safety or necessary for the exclusion of undesirable individuals, or considered necessary by the head of either government in the exercise of his special responsibility for the prevention of any grave menace to the peace or tranquillity of the territory under his government. Provision is made for India states to be placed in the same position as British India on a basis of reciprocity.

¹ Parl. Paper, Cmd. 4902, p. 20.

² S. 134.

³ S. 137.

⁴ Parl. Paper, Cmd. 4901.

⁵ S. 135.

⁶ Parl. Paper, Cmd. 4985.

⁷ Ibid. and s. 138.

25. NATIONALITY AND ALIENAGE

The rules of nationality in force in India need not be discussed at length because they are those enacted by the British Parliament and they cannot be varied by the Indian legislature.¹ It is sufficient to note that under the statutes of 1914-33² British nationality is acquired by birth on British territory and by marriage to a British subject, and in certain cases by descent from a person of British nationality. Further, nationality can be acquired by naturalization under the scheme of the Act of 1914, which provides for the creation of naturalization which produces the status of a British subject throughout the Empire. In India this provision is operative, but there is also provision by Act VII of 1926, for the grant of naturalization to certain persons not being subjects of any state in Europe or America nor of any state of which an Indian British subject is prevented by law from becoming a national by naturalization; such nationality is valid in British India and the states and British protection is accorded in foreign countries.

Aliens in India owe temporary allegiance to the Crown and are entitled to the protection of Indian laws;³ they are triable in the same manner as natural-born subjects. They are subjected to certain minor discriminations in respect of membership of local authorities, but the common law provision forbidding the ownership of real property was never introduced into India.⁴

Power was given by the Foreigners Act of 1864,⁵ which was amended in 1915, to prevent aliens from residing in British India. The central and local governments have power to order any foreigner to remove himself from British India, and a foreigner who refuses to remove himself or returns after removal may be apprehended and detained. Power is also given to bring

¹ Government of India Act, 1935, s. 110 (b) (i).

² British Nationality and Status of Aliens Acts, 1914-33. See Dicey and Keith, *Conflict of Laws* (ed. 5), pp. 141-89; British Nationality and Status of Aliens Regulations (India), 1934.

³ Cf. *Johnstone v. Pedlar*, [1921] 2 A.C. 262; *De Jager v. Att.-Gen. for Natal*, [1907] A.C. 326.

⁴ *Mayor of Lyons v. East India Co.* (1836), 1 Moo. Ind. App. 175.

⁵ Act III of 1864; III of 1915.

into effect when desired for any area provisions requiring aliens to report their arrival, to obtain licences for travel, etc.¹

The position of the people of Burma is exactly similar to that of Indians. Only those born within the limits of British Burma as determined from time to time by the Crown in Council² are *ipso facto* British subjects, and the Burmese legislature will be able to modify the Indian legislation as to naturalization within the same limits as that can be done in India. But it will equally be unable to affect the general principles of that legislation.³ Persons born in Karenni states and other non-British possessions will be aliens.

The question has, indeed, been raised whether the subjects of rulers of the Indian states may not be deemed to be British subjects.⁴ The position is anomalous, for the rulers themselves unquestionably owe allegiance, and have accepted that position. Allegiance, of course, normally means subjecthood, and it is true that the subjects of the states have for all foreign purposes to be treated as British subjects.⁵ So high an authority as Sir C. Ilbert has expressed himself in rather inconsistent ways⁶ as to the national status of states subjects in respect of their capacity for naturalization under the Indian legislation. But it must be taken that they are not British subjects, seeing that their territory is not strictly speaking British. This view has been acted on in India where they have been deemed eligible for naturalization, and in several recent cases decided in the courts.⁷ It accords with the treatment of Indian rulers as exempt from the jurisdiction of municipal courts in England,⁸ though not in Scotland,⁹ and while the position is anomalous, for no such complete exemption is given in India itself, the result must be accepted, despite its anomalous character. The status of the subjects of the states, therefore, is in some degree similar to that of the subjects of the Malay states and those of Zanzibar.

¹ Power exists to regulate entry and residence of British subjects domiciled in other British possessions on the basis of reciprocity; Act III of 1924.

² Act of 1935, s. 142.

² S. 44 (b) (i).

⁴ Cf. D. K. Sen, *The Indian States*, pp. 129 ff.

⁵ Cf. 53 & 54 Vict., c. 37, s. 15.

⁶ *The Government of India* (3rd ed.), p. 292, compared with p. 422.

⁷ Cited by Sen, *op. cit.*, p. 130.

⁸ *Statham v. Statham and Gaekwar of Baroda*, [1912] P. 92.

⁹ *Ross v. H.H. Sir Bhagvat Singhjee* (1891), 19 R. 31.

CHAPTER XI

DOMINION STATUS: THE PLACE OF INDIA IN THE COMMONWEALTH

1. THE MEANING OF DOMINION STATUS

THE term Dominion status has only become familiar within the period from 1919, but its justification lies in the decision of the Colonial Conference of 1907 to confer on the self-governing colonies the style of Dominions in order to mark them out from the other parts of the Empire. India was excluded from the Imperial Conference whose constitution was then decided upon; that body was to be the formal bond of connexion between His Majesty's governments in the United Kingdom and the Dominions, and was to consist of the Prime Ministers of the Dominions and of the United Kingdom, the latter of whom was to preside. The marking out of the position of the Dominions was continued by the Imperial Conference itself in 1911 when it insisted on the principle that not only should the Dominions continue to be consulted on all matters of foreign policy affecting them, but should also be given the opportunity of associating themselves with the United Kingdom in determining the broad lines of British foreign policy. At that date, however, it was recognized that the final voice in war and peace and alliances must rest with the British Government, whose army, fleet, and diplomatic service afforded the essential basis for active participation in world politics.¹

The further development of the status thus acquired was greatly furthered by the part played by the Dominions in the Great War, and by the determination of the Prime Minister of Canada that the sacrifices of his people should be rewarded by the recognition of the birth of a new nation worthy to rank in power and place with all save the great powers of Europe and the United States of America.² The British Government readily conceded the justice of Sir Robert Borden's claim

¹ Keith, *Responsible Government in the Dominions*, Part V, ch. v.

² Keith, *War Government of the British Dominions*, ch. vii.

supported as it was by all the Dominions except Newfoundland whose inadequate resources precluded any attempt to assert individuality in external relations. The hesitation of foreign powers yielded to the earnest request of the British Government and the Peace Conference saw the Dominions granted distinct representation as on the footing of the minor allies in the war, while they still participated in the British Peace Delegation, the successor of the Imperial War Cabinet of 1917-18 in which Dominion representatives had sat to determine the conduct of the war and the terms on which the allies might accept peace. Moreover, the League of Nations Covenant was framed to admit as separate members besides the United Kingdom each of the great Dominions, and it was expressly recognized that the Dominions would be entitled to election to membership of the League Council despite the fact that to the British Empire was allotted a permanent seat in the Council. As early as 1927 this claim was given effect and the Dominions have almost established the right to having one representative on the Council. Finally the Peace treaties were not merely, as Canada demanded, signed separately for the Dominions, but ratification was delayed until each Dominion Parliament had had the opportunity to give its approval to ratification.

Achieved amid the turmoil of the post-war settlement, the solution left much still to be done to establish on a clear footing the position of the Dominions. But the principle was definitely asserted that the Dominions had attained the right to the same measure of autonomy in external affairs as they had long enjoyed in internal matters, and that it was the duty of the British Government to give effect in due course to the doctrine accepted.

Canada took the lead in further advance. In 1920 it secured from the British Government the vital concession that it might be separately represented at Washington, if the United States would agree, by a minister plenipotentiary, who should be under the direct instructions and control of the Dominion government, though in close relations with the British Ambassador, whose place he was to take in the absence of the latter on leave. The arrangement was not to infringe the diplomatic unity of the Empire. Though this concession was

not acted on at the time, it was followed by the insistence by Canada on two doctrines. In the first place in the matter of the treaty with the United States regarding the halibut fisheries in the Pacific of 1923 Canada successfully enunciated the doctrine that a treaty which affected one Dominion only should be signed for the King by a Dominion representative alone; and secondly, in connexion with the treaty of Lausanne of 1923 Canada asserted that, without denying the power of the King on the advice of British ministers to conclude a treaty of peace binding the whole of the Empire, Canada would accept no moral obligation to participate in any measures necessary to vindicate the terms of any treaty which it had not assisted in framing. Virtually, therefore, Canada asserted the principle that, if a treaty were to be of any effect as regards Canada, Canada must be responsible for making it. The position adopted by Canada was accepted in substance as correct by the Imperial Conferences of 1923 and 1926.¹

The efforts of Canada were ably seconded by those of the Irish Free State and the Union of South Africa. The former rested its Dominion status not on a British grant but on a treaty extorted by armed rebellion, and thus claimed to be absolutely autonomous except in so far as it had voluntarily limited its powers by convention. The latter under General Hertzog developed as essential the doctrines of the divisibility of the British Empire or Commonwealth which it asserted was a mere name for a number of distinct sovereignties, and the rights of neutrality and secession. These claims were not formally conceded by the British Government; it eschewed any discussion of the theory of the Union, which was not accepted by the Imperial Conferences of 1926 and 1930 attended by General Hertzog, while it consistently insisted, as against the Irish Free State, that its relation to that body was not governed by international law, and that by the treaty itself the Free State was absolutely bound to accept the status of a Dominion on the same footing as Canada, which, it must be noted, has never asserted the doctrines of the divisibility of the Crown, or of the rights of neutrality and secession.

¹ Keith, *Constitutional Law of the British Dominions*, ch. xvi; *The Governments of the British Empire*, Part I, ch. iii and iv.

On the other hand, the British Government was most willing to assure the Dominions of all the autonomy which was possible within the free association of the Commonwealth. The declaration of Dominion status by the Conference of 1926 was of British draftmanship: it declared of Great Britain and the Dominions that 'they are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'. This assertion was gradually made more explicit, and forms devised to give it full force.

In external affairs legislation was not requisite on the part of the British Parliament to give full effect to the principle of equality and autonomy. All that was necessary was to agree that each part of the Commonwealth might make such treaties as it pleased, and that it might make its treaties in the form it pleased. Thus the Irish Free State since 1931 and the Union of South Africa since 1934, the former without local legislation, the latter under the Royal Executive Functions and Seals Act, 1934, have made treaties and accredited ministers directly through their right of access to the King, who issues full powers to sign and ratify treaties on the advice of the ministry concerned and signs letters of credence in like manner. In other cases the formal procedure of acting through the British Foreign Office and the Dominions Office is maintained as a matter of convenience, but these departments are ready to act on the wishes of the Dominion concerned. The only restriction on freedom of action are those derived from the fact that the King, while he acts constitutionally on the advice of ministers, is yet entitled to place before ministers his own views, and that, as the head of sister states, he might have to urge considerations affecting such states on the government of any one of them, should it meditate action inconsistent with the maintenance of the Commonwealth, and that the Dominions by agreements at the Imperial Conferences from 1923 to 1930 are pledged to full communications with one another in matters of external relations, so that each part may be aware of the actions of the others and may express its views on contemplated action.

The issue of neutrality in a British war on the part of a Dominion remains unsolved. It has never been formally conceded by the Imperial Conference, and it is not claimed by Canada, Australia, or New Zealand. The Prime Minister of the Union asserts the right, but the Union is bound under the accord of 1921, under which the British Admiralty transferred to it valuable properties for defence purposes to aid in the defence of Simonstown, the British naval base in the Union. Despite the assertions of the Prime Minister, it is incredible that such a duty if performed would be compatible with neutrality under international law; the authorities on which he relies are wholly antiquated.¹ Mr. de Valera, who would desire to claim for the Free State the right of neutrality, has admitted that the obligations of the state to afford facilities to the British forces in war are incompatible with any international claim to have neutrality, even if proclaimed, respected by any foreign power.

In internal affairs it was found necessary by the Statute of Westminster 1931 to sweep away the formal remnants of imperial paramount power.² The statute therefore abolished for those Dominions who desire to accept the grant—so far Canada, the Free State, and the Union only—the principle that legislation contrary to imperial legislation applying to the Dominion is invalid, and has recognized their power to legislate with extra-territorial effect, and to render their freedom more indisputable has declared that no Imperial Act shall extend to any Dominion after December 11th 1931 unless it is declared therein that the Dominion in question has requested and assented to the enactment. It is perfectly true as the Privy Council said in deciding the case of *British Coal Corporation v. The King*³ that the Imperial Parliament in theory, being incapable of parting with its sovereignty, could repeal the provision of the statute itself, but such action may be ruled out of the bounds of possibility.

The extent of the powers given has recently been stated by the Privy Council in reference to the question of the right of the

¹ Keith, *Journ. Comp. Leg.*, xvii (1935), 273, 274.

² 22 Geo. V, c. 4; Keith, *Speeches and Documents on the British Dominions*, 1918-1931, pp. 231-307.

³ 51 T.L.R. 504; [1935] A.C. 500.

Canadian Parliament to abolish the appeal from the Supreme Court of Canada and other courts in criminal matters and of the Irish Free State Parliament to eliminate the appeal, civil and criminal alike, from the Free State constitution.¹ It ruled that both legislative enactments were valid in law, and it thus negated the view that the legislature of a Dominion is unable to effect vital royal prerogatives applicable to that Dominion.

There are in the case of Canada limits on the authority conferred by the statute, for it is clear that the constitution of a federation cannot be changed lightly, and the framers of the Canadian constitution intended that in all vital matters it should remain unaltered. The new powers, therefore, do not permit the alteration at the pleasure of the federation of the Canadian constitution, and the power to change remains vested in the Imperial Parliament, which could only act if the desire for change were supported by the provinces as well as the federation.²

The Commonwealth of Australia and New Zealand have not adopted the operative clauses of the Statute of Westminster; if they do, they will still remain bound by existing restrictions on constitutional change.

There remains to be considered the power of disallowance of Dominion Acts, which is provided for in their constitutions. Under the new powers which they enjoy this power has been eliminated from the constitution of the Union, while disallowance never was included in the Free State constitution. But that Dominion has, like the Union, removed the power of reservation of Bills, with the one exception in the Union that Bills to affect the prerogative right of the Crown to grant leave to appeal from the Appellate Division of the Supreme Court of the Union must be reserved. The power to remove even this restriction, of course, exists and may be exercised.

The plenitude of power thus accorded has raised in the Union the question of the right of secession by unilateral action. The Union by the Status of the Union Act, 1934, has adopted the Statute of Westminster as part of her constitution

¹ *Moore v. Att.-Gen. for the Irish Free State*, 51 T.L.R. 508; [1935] A.C. 484.

² Cf. the refusal of Parliament even to receive the Western Australian petition for secession from the Commonwealth; May 22nd 1935; H.C. 88 of 1935; Keith, *Journ. Comp. Leg.*, xvii, 269.

and claims to be a sovereign and independent state as explained by the Conference of 1926. It is also asserted that under the Royal Executive Functions and Seals Act, 1934, the governor-general might legally assent to an Act terminating the connexion of the Union with the British Crown or establishing a new dynasty. This speculation is of minor importance, because whatever the Union may decree it cannot deprive persons born therein of their status as British subjects while outside the Union, even should it repeal its own legislation, the British Nationality in the Union, Naturalization and Status of Aliens Act, 1926, and also the imperial legislation of 1914 which declares for the whole Empire the status of British subjects. It is therefore clear that secession could be effectively accomplished only by bilateral action, and in the light of this fact the theoretic right of secession assumes little importance.

At the same time it should be noted that none of the Dominions could possibly stand alone in present world conditions, without running grave risks. Canada, indeed, by reliance on the Monroe doctrine and American protection might preserve independence, but rather as a client of the United States than as a state of full authority in the sphere of international politics. Her position *vis-à-vis* the United States has always been greatly strengthened by the fact that she is part of a great Empire. Australia and New Zealand have avoided any defiant assertion of personality which might deprive them of British protection against the growth of Japanese power and the possible revival of Chinese authority in the Pacific. The Union is dependent on British sea-power for the security of her exports, especially of those of gold, and the Irish Free State is so geographically situated that her defence will always be assured by British interests.

2. THE POSITION OF INDIA IN THE COMMONWEALTH

Viewed historically, it is clear that the action of the Colonial Conference of 1907 in excluding India from representation thereat as an equal member denied to India the status of a Dominion. It is true that in fact the interests of India were

adequately conserved by the representations of the secretary of state at the Imperial Conference of 1911, but it was not until the services of India in the Great War were realized and the necessity of meeting Indian aspirations was recognized that the necessary steps were taken to undo a serious blunder. On April 13th 1917¹ the Imperial War Conference resolved that the resolution of the Conference of 1907 regarding the constitution of the Conference should be modified so that India could be fully represented at all future Conferences, and that arrangements with the members of the Conference should be made to permit this being done. This resolution was early given effect. India *de jacto* had been represented at that Conference and took her full place at the Imperial War Cabinet of that year and at the Cabinet and Conference of 1918. The Conference of 1917 further recognized the desirability of the readjustment of the constitutional relations of the parts of the Empire 'based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth and of India as an important portion of the same' and the recognition of the right of the Dominions and India to an adequate voice in foreign policy. Moreover, it gave effect to its views on the position of India by accepting the principle of reciprocity of treatment between India and the Dominions. It was accordingly entirely in harmony with this doctrine that the British Government in the announcement of August 20th 1917 spoke of the progressive realization of responsible government in India as the goal of its policy. India, it is clear, -was in 1917 recognized as potentially a Dominion.

The decision to confer Dominion status on India, however, was finally confirmed by the events of 1919. It was open to the British Government to insist on treating India as an integral part of the Empire for foreign policy. Instead, without any coercion, and rather to the surprise of those immediately concerned with Indian affairs, it was decided to treat India as a Dominion, to give India a distinct place in the negotiation of the treaty and its signature, and to secure for India separate membership of the League of Nations. Until that was done it might perfectly well have been argued that all that was promised

¹ Keith, *Speeches and Documents on Indian Policy*, ii, 132.

to India as the ultimate goal of its endeavours was responsible government of the type understood in 1917, at a time when the developments of Dominion autonomy in external affairs were only slowly being realized, and were quite unknown to the vast mass of British and Dominion opinion. But by securing admission of India to the League, the British Government virtually, though not technically, bound itself to the task of creating a self-governing India which would be entitled on the same basis as the Dominions to vote freely in the business of the League. In the long run an India which was merely a duplicate of the British Government would be an anomaly in League proceedings.

The implications of the position were naturally enough recognized in India, and it was no accident or inadvertence which led the Labour Government of 1929 to sanction the announcement by Lord Irwin of their view that it was implicit in the declaration of 1917 that the natural issue of India's constitutional progress as there contemplated was the attainment of Dominion status. The phraseology was probably unfortunate, because in 1917 the term 'Dominion status' was yet to attain currency, and it is quite certain that no one in 1917 foresaw the complete change in reference to international affairs which was achieved in 1919. It would have no doubt been wiser to adopt a more simple form of declaration, and it was no doubt unwise to make the statement at all at a time when the Statutory Commission had not reported, and when neither of the other two great political parties was prepared to approve the terms of the declaration. Moreover, as was natural, the interpretation put on Dominion status by many Indians was the widest possible; Srinivasa Sastri was reported as holding that it connoted the right of secession and that accordingly it could be accepted as the goal by those Indian politicians whose ideal was full self-government as an independent state. Nevertheless, it must be admitted that it did not lie with the government which secured the admission of India to the League of Nations to deny that the goal of India was Dominion status.

In the acrimonious discussion in the House of Commons¹ on

the declaration stress was laid by the secretary of state on the steps taken towards giving India the realities of such status. He pointed to the right of India under the fiscal convention to fix her fiscal policy as desired by the Indian government and legislature free from British control; to the decision permitted in 1921 to purchase stores without regard to British interests; to the presence of an Indian High Commissioner in London; to the distinct representation of India on the Labour Organization of the League, to its independent voice in labour questions; to the fact that the Indian delegation to the League Assembly had been headed in 1929 by an Indian and that India was represented with the Dominions on the Imperial Conference summoned to discuss the legislation to secure the status of the Dominions. For the Liberal Party Lord Reading made it clear that there was willingness to accept Dominion status as the ultimate goal, but that it was essential to bear in mind the limitations in the declaration of 1917¹ and the preamble to the Act of 1919. Mr. Lloyd George shared the same view, pointing out that the declaration had already produced misunderstandings, a view verified by the insistence of Mr. Fenner Brockway that the conference which was to meet to discuss the constitution must embody the principle of Dominion status in its report. The least favourable view was that of Lord Salisbury, who insisted that Dominion status was not a goal to which they were pledged, but a conditional purpose, and that it depended on the fulfilment of the conditions.

In the debate of December 2nd and 3rd 1931, after the formation of the National Government, Mr. Churchill, who had earlier expressed himself incautiously as looking forward to the addition of India to the Dominions, explained his position. India during the Great War had attained Dominion status as far as rank, honour, and ceremony were concerned, but he did not foresee any reasonable time within which India could have the same constitutional freedom as Canada. The sense in which Dominion status was used ten or fifteen years ago did not imply, in his view, Dominion structure or Dominion rights. The Statutory Commission had deliberately excluded Dominion

¹ Keith, *Speeches and Documents on Indian Policy*, ii, 133, 134; House of Lords, November 5th 1929.

status from its epoch-making report. Moreover, the character and definition of Dominion status had been fundamentally altered by the Imperial Conference of 1926 and the Statute of Westminster, and he therefore urged the House to agree that nothing in the Indian policy of the government should commit the House to the establishment of a Dominion constitution as defined by the Statute of Westminster. His amendment was defeated in favour of the governmental policy, but the government was careful not to reiterate the doctrine of Dominion status as the ultimate goal. Its silence was not unnatural, as the passing of the Statute of Westminster, 1931, had rendered it very difficult to say what bounds could be set to that autonomy which it furthered. It was, however, made amply clear that the governmental policy insisted on the doctrine of 1917 and 1919 that the aim was progressive realization of responsible government as an integral part of the British Empire. At no time since has the government deviated from that attitude.

In March 1933, when the White Paper proposals were commended for the acceptance of the House of Commons, Mr. Attlee objected that Dominion status had disappeared even as a goal, but Sir H. Samuel contended that the measure would bring Dominion status very close, a view as optimistic as the other was pessimistic. The government then and later, despite a rather informal reaffirmation of Dominion status as the goal by Lord Willingdon, maintained a remarkable silence, doubtless in view of the claims as to Dominion status urged and acted on by the government of Mr. de Valera in the Irish Free State, and by the action of the Union Parliament in 1934 in passing the Status of the Union Act which its Prime Minister asserted was intended to establish the doctrines of the divisibility of the Crown and the rights of neutrality and secession by unilateral action. It was not until the Government of India Bill was actually before the Commons that the government explained its attitude, when asked to insert in a preamble a declaration of Dominion status as the ultimate goal. It had naturally aroused doubts in India of the intentions of the government when it was realized that the joint committee had sedulously and rather absurdly avoided a vital issue.

The ministerial explanation was that no preamble was required as no new policy was contemplated; the preamble of 1919, as the committee had said, had set out definitely and finally the aims of British rule in India. It was not proposed to repeal the preamble, but the government reiterated its agreement with the interpretation of the preamble given by Lord Irwin in 1929 on the authority of the government of the day. The obstacles to Dominion status were not created by the British Government: they depended on the differences in India of race, caste, religion, and on the inability of India to undertake the burden of her own defence. These difficulties could not be removed by any British Parliament or Government, but sympathetic help and co-operation would be available to enable India to overcome these difficulties and ultimately to take her place among the fully self-governing members of the British Commonwealth of Nations.¹ Mr. Attlee² in reply moved an amendment for the rejection of the Bill on the ground that it did not explicitly recognize the right of India to Dominion status, and that it did not by its provisions as to franchise and representation assure to the workers and peasants of India the possibility of securing by constitutional means their social and economic emancipation. The government, however, refused both in the Commons and the Lords to do more than to retain the preamble of the Act of 1919 while wiping out all else. The Attorney-General deprecated inserting the words Dominion status because they were open to varying interpretation and their insertion would raise the issue, Was the status of 1935 referred to or that of some subsequent period? He himself, however, deprived this rather unsatisfactory apologia of some of its sting by asserting that he looked forward to India taking her place in full and free association with the other members of the British Commonwealth of Nations. In the Lords, Lord Crewe insisted on the fact that India already enjoyed Dominion status, though she did not yet exercise Dominion functions, but the contention is hardly of much weight, for by Dominion status men understood the exercise of functions; the effort of Lord Balfour in 1926 to

¹ Cf. the Committee's Report, i, 100, 101.

² Similarly Mr. Morgan Jones moved rejection at the third reading in June 1935.

induce the Dominions to accept equality of status as opposed to function, though expressed in the comment on the Conference definition, had never received any effect. It must be held a mistake to refrain from including the words in the preamble. Inserted there, they would, as Sir T. Inskip insisted, have just the same weight as a formal declaration in Parliament of the governmental intention. Neither preamble nor declaration can bind a succeeding government, and it was inevitable that omission from the preamble would be resented in India, nor was the attitude of the government approved by many of its own convinced supporters.

The omission of reference to Dominion status was one of the many reasons urged against the acceptance of the joint committee's scheme in February 1935 in the Indian legislature. Even a supporter of the scheme like Mr. H. P. Mody, a spokesman of Indian commerce, condemned the omission, and the Assembly finally resolved that the scheme of provincial government was unsatisfactory inasmuch as it included various objectionable principles, particularly the establishment of second chambers, the extraordinary and special powers of the governors, provisions relating to police rules, secret service and intelligence departments, which rendered the real control and responsibility of the legislature and executive ineffective. But All-India federation it held to be totally bad and totally unacceptable to the people of British India, and recommended instead the grant of responsible government in British India alone. These resolutions, carried by seventy-four to fifty-eight votes, were followed by intimations of the intention of the Congress party, when provincial autonomy was established, to use entry into the legislatures as a means to prevent the functioning of the constitution in the mode intended by its framers.

It is easy to see that on the whole the conception of Dominion status has worked harm in Indian politics. The fundamental mistake was that of 1919, when India was given a place in the League of Nations at a time when her policy internal and external was wholly dominated by the British Government. The justification for League membership was autonomy; it could fairly be predicated of the great Dominions; of India it

had no present truth, and it could hardly be said that its early fulfilment was possible. In these circumstances it would have been wiser candidly to admit that India could not be given then a place in the League, while leaving it open for her when autonomous to be accorded distinct membership. It would have been just to assure India membership of the Labour Organization, for it was possible to permit India self-determination in that regard. As it is, in the League India's position is frankly anomalous, for her policy is determined and is to remain determined indefinitely by the British Government.

As regards internal issues the expectation of Dominion status at an early date, fostered unquestionably by the action of the Labour Government in 1929, has worked unhappily, encouraging in India hopes which the British Government of 1929 must have known were premature, and which certainly were not shared by the National Government of 1931. It is quite legitimate to hold that the action of 1917 was based on the failure to realize that responsible government of the British type was not a wise promise to make to India. The essence of responsible government, it may be held, is the existence of a people sufficiently homogeneous to be governed by majority rule; where caste, race, religion intervene, majority government becomes difficult or impracticable, and it is perfectly arguable that what was due to India was the chance of government by Indians on such lines as might be found appropriate to Indian conditions. At any rate, all British constitution-building for India has been carried on under grave difficulties. It has been realized that majority rule is impossible, but with the safeguarding of minorities the essence of responsible government is seriously if not fatally compromised. If the governors of the provinces were seriously to act on their special responsibilities, it is certain that responsible government would never emerge; but if they do not, much injustice may be done to those classes too little advanced politically to make use of the franchise, or too poor to enjoy it. It is difficult to resist the impression that either responsible government should have been frankly declared impossible or the reality conceded; it is not surprising that neither gratitude nor co-operation is readily forthcoming for a hybrid product such as is the provincial system of special

responsibilities and acts to be done according to individual judgment. It is easy to see how the present proposals have developed themselves from the announcement of 1917 and the Act of 1919; but, if the source was tainted, it cannot be a matter of surprise that the stream is poisoned. It is, of course, to be hoped that the plan will develop into true responsible government through the wise disuse of the theoretical powers of the governor; it might do so if Congress gave co-operation in the sense of working the scheme in order to demonstrate that it was only by accepting ministerial advice that the wheels of government could be made to revolve smoothly.

For the federal scheme it is difficult to feel any satisfaction. The units of which it is composed are too disparate to be joined suitably together, and it is too obvious that on the British side the scheme is favoured in order to provide an element of pure conservatism in order to combat any dangerous elements of democracy contributed by British India. On the side of the rulers it is patent that their essential preoccupation is with the effort to secure immunity from pressure in regard to the improvement of the internal administration of their states. Particularly unsatisfactory is the effort made to obtain a definition of paramountcy which would acknowledge the right of the ruler to misgovern his state, assured of British support to put down any resistance to his régime. It is difficult to deny the justice of the contention in India that federation was largely evoked by the desire to evade the issue of extending responsible government to the central government of British India. Moreover, the withholding of defence and external affairs from federal control, inevitable as the course is, renders the alleged concession of responsibility all but meaningless. Further, it is impossible to ignore the fact that, if the state representatives intervene in discussions of issues in which the provinces are alone concerned, their action will be justly resented by the representatives of British India, while, if they do not, there may arise the spectacle of a government which when the states intervene has a majority, only to fall into a minority when they abstain. Whether a federation built on incoherent lines can operate successfully is wholly conjectural; if it does, it will probably be due to the virtual disappearance

of responsibility and the assertion of the controlling power of the governor-general backed by the conservative elements of the states and of British India.

One essential requisite, moreover, for the working of responsible government is the existence of effective political parties. These, however, have not yet fully developed even in British India. The Indian National Congress, now freed by the collapse of non-co-operation from the governmental ban, which possesses organization of a widespread character and considerable financial resources, won 44 out of 106 seats at the Assembly election of 1934, but it is disabled from constructive operation by its determined refusal to accept the reform scheme. In itself it contains very disparate elements which work together only because of their negative policy. The Hindu Mahasabha, though it has co-operated with Congress in the ideal of Swaraj, is opposed to it in so far as its aims are essentially communal. There has also developed a strong left wing element in the Congress, which is definitely Socialist¹ and which stresses the necessity of winning social and economic freedom for the masses, in opposition to Mr. Gandhi's policy which has endeavoured to secure the co-operation of landlord and peasant, capitalist and workers, rich and poor. Much more in harmony with Congress is the Congress Nationalist party, whose chief difference with the main body lies in its opposition to the communal award of 1932.

The depressed classes—some forty to forty-five million strong—have their own separate interests and the Justice, or non-Brahman, party in Madras, Bombay, and the Central Provinces is prepared for constructive work in the political sphere. The Indian Liberal federation, representing the revolt in 1918 of the moderate elements from Congress, is strong in the ability of its leaders, but has little popular appeal; its chief divergence from Congress is due not to lack of Nationalist feeling but to belief that Indian self-government can best be achieved within the British Commonwealth. The Muhammadans for the main accept the communal award and desire to work the constitution, but a section favours co-operation

¹ S. C. Bose, *The Indian Struggle*, pp. 344 ff., stands for a synthesis of communism and fascism, anti-democratic, authoritarian, and under strict party discipline.

with Congress. Europeans in India have recently improved their organization in order to defend their interests, and the Anglo-Indians and the Indian Christians¹ have also found organization essential, while provincial associations of landholders have been formed to safeguard their interests. Nationalist sentiment and communal feeling still dominate the situation, and the rise of true political parties cannot be expected until the emergence of more general issues of division to which religious and social differences may be subordinated. It may be noted that the Justice party is open to include all those who wish to join it on the basis of a policy of social and economic reform, and accepts Brahmans, Europeans, Muslims, and Anglo-Indians, though it is still partly a communal party inside the Hindu community. There is clearly better hope in the provinces than in the federation for the evolution of effective parties. An essential part of such evolution must be the forming of real bonds between electorate and member, a matter yet to be accomplished, as the Simon Commission showed.²

There remains to be considered the position of India with regard to the Dominions and colonies. It seems impossible for the Dominions to permit immigration, and this bars any intimate association between an autonomous India and the Dominions; it may ultimately preclude even co-operation within the Commonwealth. In the case of the colonies India now controls absolutely emigration and permits it only under fair conditions, approved not only by the government but also by the central legislature;³ such emigration is permitted to Ceylon and Malaya. Some feeling has been raised by the refusal of the franchise in Ceylon to immigrants save after five years' residence and proof of intention to settle.⁴ The Kenya issue has abated in seriousness in view of the prospect of the maintenance of British control for a considerable period under

¹ On August 9th 1934 the Assembly supported the claim of the community—rapidly growing and literate in unusual degree, to a fair share of appointments.

² Parl. Paper, Cmd. 3568, pp. 199-202. The party supports rather than selects the candidates. Only political responsibility will produce contact of members and electors. The Communist movement, now illegal, is bent on destruction of all government; Legislative Assembly Debates, August 14th 1934.

³ Act VII of 1922. The numbers abroad were, about 1931, Ceylon, 800,000; Malaya, 628,000; Mauritius, 281,000; West Indies, 279,000; South Africa, 165,000; Fiji, 73,000; East Africa, 69,000.

⁴ Ceylon (State Council Elections) Order in Council, 1931, ss. 7, 9.

the decision of the British Government in 1932,¹ but the refusal to place Indians there and in Fiji² on a footing of electoral equality remains a serious practical as well as theoretical grievance which the British Government can hardly be excused for failing to remedy. Federation, it may be hoped, may secure at least the removal of this injustice, against which all elements in India have united in protest,³ but which was initiated by Lord Elgin, an ex-Viceroy.⁴

¹ Parl. Paper, Cmd. 4141; H. of C. Paper, 156 of 1931.

² Emigration thither was stopped in 1916. Representation is communal under the Letters Patent, February 9th 1929 (amended March 24th 1932).

³ Assembly debate, March 27th 1935; Viceroy's speech, September 16th 1935. In 1934-5 marketing legislation in Uganda, Tanganyika, Kenya and Zanzibar evoked protests, and a mission by Mr. Menon to investigate the issue.

⁴ Lord Elgin was also responsible for the complete surrender of Indian interests in South Africa in 1906-8. But the blame for ignoring Indian rights must be shared by the Cabinet.

CHAPTER XII

THE ACTS OF 1935 IN OPERATION

1. RESPONSIBLE GOVERNMENT IN THE PROVINCES

THE creation under the Government of India Act, 1935, of a wide electorate led to determined efforts by the National Congress¹ to secure widespread support for its candidates on the basis of definite hostility to the Act. The elections were conducted in January and February 1937 with remarkable smoothness, a testimony to self-restraint on the part of the political leaders, and the results were conclusive of the strength of Congress. It obtained clear majorities in Bombay, Madras, the United Provinces, the Central Provinces, Bihar and Orissa. It formed the largest single party in Bengal, Assam, and the North-West Frontier Province, no mean feat, and only in the Punjab and Sind was it negligible in strength. The issue then arose whether the party should work towards its aim of independence by refusal to take office, and the use of its numbers to destroy any chance of ministries being formed successfully from the other parties, or by acceptance of office, and its use to strengthen the right of India to self determination. The barrenness of mere opposition told heavily in favour of taking office, but strong prejudices had to be overcome. In particular the Chairman of the All-India Congress Committee, with which, in view of the impracticability of holding a plenary meeting of Congress, the decision must rest was thought to be hostile to acceptance of office, and Mr. Gandhi's attitude was enigmatic.

Finally, on March 13th, the Committee at New Delhi by 127 to 70 votes passed a resolution under which it 'authorizes and permits acceptance of office in the provinces where Congress commands a majority in the legislature, provided that Minister-ships shall not be accepted, unless the leader of the Congress

¹ The 50th Indian National Congress (Faizpur, December, 1936) had decided to reject the new constitution.

party in the Legislature is satisfied and able to state publicly that the governor will not use his special powers of interference or set aside the advice of ministers in regard to their constitutional activities.' It was later laid down that Congress expected Ministers, if they took office, to aim at substantial reductions in rent and revenue demands; assessment of income tax on a progressive scale on agricultural incomes, subject to a prescribed minimum fixity of land tenure; repeal of all repressive laws; the release of political prisoners, and the restoration of property confiscated or sold during the civil disobedience movements.

These demands resulted in grave errors on the part of the British government. When the Governor of Bombay, on March 25th, 1937, invited Mr. B. G. Kher to discuss the formation of a ministry, the latter asked an assurance that 'His Excellency would not use in regard to the constitutional activities of the cabinet his special powers of interference or set aside the advice of his ministers.' The governor in reply insisted that under the Act it was impossible to give any assurance. The terms were mandatory, and the obligations imposed on governors by it and by the instrument of instructions, in respect of the use of the special powers and the safeguarding of minorities, were of such a nature that, even if the governor wished to relieve himself of them, it was not in his power to do so. On the other hand Mr. Kher could rely on receiving all possible help, sympathy and co-operation in the event of his undertaking to form a ministry. Similar questions and answers were reported from the other provinces, making it plain that the Secretary of State had dictated the terms. It was plain that the obvious reply of each governor to his potential ministry was that, if its activities were constitutional, no issue of his action on his special powers could arise, since the rules of the constitution, as of the British constitution, forbade ministers to oppress minorities, to injure the interests of the states, to neglect the maintenance of peace and tranquility, to weaken the position of the police as the means of enforcing law and order, or to treat unjustly the civil service.¹ The actual replies left it open to argue, as did

¹ Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936-7, pp. 107-14.

the leaders of Congress, that the British government had plainly shown that its talk of responsible government was dishonest.

The governors then chose ministries from those members of the lower houses who were willing thus to act. The action taken was criticized severely by Congress, but without sufficient ground, for it was necessary that the right to suspend the operation of the constitution¹ should be exercised only after the legislature had shown itself definitely determined not to allow the new ministries to function. On the other hand, the project of allowing these ministries to defer meeting the legislatures for as long as possible under the terms of the Act, six months, was plainly unconstitutional, and, had it been carried out, those acting as ministers must have deserved grave censure, for a minority ministry has no right to evade the control of the Assembly. Mr. Gandhi, whose diplomatic skill throughout deserved high praise, made the ingenious suggestion on April 11th that a tribunal of three judges should be asked to pronounce on the issues of the legality of the governors giving the pledges asked for, and of the functioning of minority ministries, a proposal negatived by Lord Zetland;² there could indeed have been little doubt of the replies, and an affirmative answer on the first point would have embarrassed the British ministry. Mr. Gandhi on March 30th had made it perfectly clear that Congress asked for nothing inconsistent with the Act, but merely desired to ascertain whether Sir Samuel Hoare's repeated assurances that responsibility would rest with ministers were to be honoured. Even moderate statesmen like Mr. Srinivasa Sastri and Sir A. P. Patro condemned Lord Zetland's negations as inconsistent with good faith. Support came mainly from Europeans³ who had been hostile to the idea of responsible government, and who by insistence on safeguards excessive in character had overloaded the Act of 1935 and incited Congress to continued hostility. On the other hand Congress was urged by well-wishers to remember the power of furthering national interests given by responsible government,

¹ Act of 1935, s. 93.

² Mr. Butler, House of Commons, April 26, 1937.

³ e.g., Madras, April 23, 1937.

and not to throw away the chance of contributing decisively to the well-being of the people by taking office.

Fortunately, a way out was found. Mr. Gandhi¹ suggested that, as Congress was anxious to accept office, their demands would be met by an undertaking that a governor, in the event of a serious disagreement with ministers, would either dismiss them or demand their resignation, and indicated preference for the latter step. Lord Zetland on June 8th enunciated the very unsatisfactory doctrine that the Act contemplated only resignation by ministers or dismissal by the governor, and not a request by the governor for resignations. This was clearly absurd, ordinary considerations of courtesy requiring that the ministry should be given an opportunity of resigning if it so desired. But his attitude was conciliatory, and the governor of Bihar on June 10th took the opportunity of explaining clearly that in matters within the functions of ministers the duty of a governor was to follow their advice unless there were strong reasons to the contrary, even in regard to such matters as partly excluded areas. Agreement with ministers would often result from frank discussion, and resignation or dismissal would be appropriate only in case of grave disagreement. On June 21st the governor-general broadcast views of a definitely conciliatory kind. He insisted that there was no vestige of foundation for the assertion that the governor was entitled under the Act at his pleasure to intervene at random in the administration of the province. His special responsibilities existed, but were restricted in scope to the narrowest limits possible. Even so a governor would always be concerned to carry his ministers with him, while in the field of their ministerial responsibilities it was mandatory on him to be guided by their advice, even though he might not be wholly satisfied that it was necessarily and decisively the right advice. He pointed out that, if in the sphere of his special responsibilities a governor accepted or rejected advice, responsibility to Parliament fell on him alone. The question of resignation or dismissal should arise only on a grave difference of view when ministers felt that their credit and position were compromised by action taken by the governor against their advice. If such disagreement

¹ Sir L. Ward, House of Commons, June 7, 1937.

occurred, then resignation by the ministry would be normally proper, failing which the governor might dismiss, but to ask for resignation was not within the scope of the Act which did not contemplate his thus being able to shift responsibility. This last view is wholly untenable. If ministers resign because of action by the governor, while they are responsible to the Assembly, he is also responsible to Parliament, so that he could not shift responsibility by asking for resignations, which in fact would be much more courteous than dismissal without option.

Congress was now able to move. On July 17th at Wardha its Working Committee noted utterances by Lord Zetland, his Under Secretary, and the Viceroy, which approached though they did not meet fully the demand of Congress, and, while reasserting that the relation of the British government to the people of India was that of exploiter and exploited, not, as alleged, of co-operation, it resolved, in view of the difficulty which now existed for the use by governors of their powers, 'that Congressmen be permitted to accept office where they may be invited thereto, but desires to make it clear that office is to be accepted and utilized for the purpose of working in accordance with the lines laid down in the Congress election manifesto, and to further in every possible way the Congress policy of combating the new Act, on the one hand, and prosecuting a constructive programme on the other.' The Working Committee's resolution was accepted as valid, without endorsement by the All-India Congress Committee, in lieu of that of March 18th; it was acclaimed justly as a triumph for the diplomacy of Mr. Gandhi. The minority ministries in the six provinces recognized that constitutional propriety required resignation, and the governors had no difficulty in securing Congress governments. The result was that responsible government, already working in five provinces, was extended effectively to the other six, establishing a vitally new position in India, for responsibility under the Act of 1919 had been a hollow mockery.¹

The success achieved was immediately productive of another. In the North-West Frontier Province a non-Congress government had been formed, which by manipulation of the rules of procedure evaded immediately thereafter a non-confidence

¹ Cf. A. Appadorai, *Dyarchy in Practice*.

motion in the Assembly, while the governor promptly refused to allow discussion of the mode in which he had formed his ministry under clause VII of his Instructions on the score that the matter fell within his individual judgment.¹ This technical plea should plainly not have been raised, as it negated responsible government. Even, however, with his support, the ministry failed to sustain itself. By securing the aid of some unattached members the ministry was refused power to pass its budget and its existence terminated, Dr. Khan Sahib forming an essentially Congress ministry. In Assam also Congress showed its strength, the ministry being repeatedly defeated, leaving only Bengal, the Punjab, and Sind, especially the last two, out of its sphere of domination.

The aims of Congress, it was explained by Pandit Jawaharlal Nehru on July 10th, had in no way been altered by acceptance of office. The main objective remained to end the constitution and to have a constituent Assembly. It meant a fight against the coming federation by all means inside and outside the legislatures. 'The gulf between the British Empire and us cannot be bridged. We do not go to work the constitution in the normal way, but to try to prevent federation materializing.' But this does not mean that the Congress governments will fail to strive in their actions to effect substantial improvements in the position of the people, and sane and well-planned budgets and numerous legislative proposals indicate the intention to further the social and economic aims of the people. Fortunately, the support of the Indian Civil Service has been forthcoming in no niggard measure for the schemes of the new ministries, thus negating the predictions that in the bureaucracy would be found stubborn resistance to reforms. The civil servants have for the most part fully accepted the duty of loyal co-operation in carrying out policy, responsibility for which has now passed from their hands. That the new governments have grave tasks to face is clear; the gradual introduction of prohibition, favoured by Congress, has many obstacles to overcome, and the financial situation is always difficult. Ministries, who have limited their salaries to rs. 500 a month, have already been forced to seek

¹ The Muslim League in Bombay in August 1937 attacked bitterly the governor because of his selection as his second Muslim Minister of a member who had been elected as an Independent but had joined the Congress Party.

economies in the cost of the services, and this presents issues of difficulty, for they cannot deal with salaries determined by the secretary of state,¹ and yet the cost of the European and Indian members alike of the Indian Civil Service presses heavily on their slender resources. How far it may be possible to secure relief from voluntary action by civil servants or the decision of the secretary of state is uncertain, and there must be a strong demand for the reduction to the minimum necessary of servants whose maintenance imposes an undue burden on the people. Risk of friction from this source is more obvious than from any other. Release of criminals whose offences have been purely political presents less difficulty, the measure of disagreement which has shown itself depending as usual on the issue whether those condemned have not gone beyond the limits of political protest and descended into crimes of violence.

A point of some constitutional importance arose in April, when the validity of the election of the Speaker of the Bengal Assembly was questioned on the score that the meeting of the Assembly on April 7th, when the election was carried out, was illegal, the ground alleged being that its chairman was appointed by the governor whose own appointment was invalid, seeing that he had not been formally appointed to that office by commission under the royal sign manual as provided for by the Act of 1935. Lort-Williams J. dismissed the application for a declaration of invalidity on April 29th, nor can there be any doubt that his decision was sound, since s. 321 of the Act could be deemed to convert the appointment of governor already existing into one under the new Act. Moreover, the rule that a governor must be appointed by commission, instead of as formerly by warrant, is not mandatory under s. 48 of the Act, but merely describes the mode in which the royal pleasure is intended to be exercised.

A constitutional development of great interest is the fact that several Congress ministries are subject to the control of Congress in their activities. A board of three Congress leaders has been entrusted with the task of and advising, guiding, and, where necessary controlling, the ministries and

¹ In Assam the Speaker ruled (August 27) that a motion refusing supply for two Commissioners was legal and binding.

legislators, including legislators in provinces where Congress is in a minority. It is significant that of the three a Muhammadan is given charge of the four provinces (Bengal, Punjab, North-West Frontier Province, Sind), where there is a Muslim majority, and of the United Provinces, the most populous of the Hindu-majority provinces. And no Hindu, therefore, is accorded control of a Muslim province, a fact which is naturally adduced as proof that there is no truth in the accusation made on July 20th by Mr. A. K. Fazlul Huq, Chief Minister of Bengal, that Congress is dominated by the communal ideas of the Hindu Mahasabha. It is significant also that in all Hindu-majority provinces ministers have been appointed from the ranks of Muslims where they have been available.¹ The action of Congress is, of course, dictated by the fact that only through the removal of communal strife is there any possibility of the attainment of full responsible government in India, even in the provincial sphere. It is pointed out that even in the Hindu-majority provinces Muslims can best promote their interests by accord with Congress. Naturally the efforts of Congress are strongly opposed by those Muslims who place communal considerations above national as in Bengal, and the Bengal Government's unwillingness to release détenus has been ascribed to the fact that many of those detained are Hindus, while the ministry has also been accused of hesitation to afford redress to Hindus complaining of attacks on their religion. These charges and counter-charges of communal feeling impose on the governors a peculiar burden of responsibility for the protection of minorities. But a more useful safeguard is that afforded by the consideration that unfairness to the minority in one province may easily provoke retaliation in another province, and thoughtful Muslims have emphasized the necessity of their community learning to dispense with communal electorates and to work in harmony with Hindu India.²

The Legislative Councils' constitutions were fully defined by Order in Council of April 30th, 1936. It was provided that as

¹ In Orissa no Muslim member of the Assembly was available.

² Sir S. A. Khan, *The Indian Federation*, pp. 334 ff. The Muslim Chief Minister of Sind has also declared in favour of joint electorates, and co-operation with Congress was urged on August 22 by Sir Wazir Hassan when presiding over the annual meeting of the Bengal Presidency Muslim League.

far as possible no person should be enrolled in more than one constituency, and in any case no one might vote in more than one at any election. Where more than one seat fails to be filled in any constituency, the rule is that the voter has as many votes as there are seats and can do as he likes with them to fill; but there is an exception in the case of the three European seats in Bengal where no voter may give more than one vote to any candidate. Proportional representation is confined to the seats in Bengal and Bihar to be filled by election by the Assembly. In Madras the thirty-five general seats are divided among three constituencies with three seats, five with two, and sixteen with one; in the Muhammadan constituencies two have two members, three one; the whole province serves as the constituency for the one European and the three Indian Christian members. In Bombay urban Bombay has four seats, eight rural constituencies have two apiece, while for the Muhammadans there is one constituency with two members, and three with one; the whole province returns the European member. Bengal has only single member constituencies for the ten general and seventeen Muhammadan seats, while the whole province returns three Europeans, and the Assembly elects twenty-seven. The United Provinces have similarly only single-member constituencies, thirty-four general, seventeen Muhammadan, with one European from the whole province. Bihar had nine general and four Muhammadan constituencies, each with one-member, and the province returns one European, while the Assembly elects twelve members. In Assam the whole province returns two Europeans; there are ten general and six Muhammadan single-member constituencies. The number of seats to be filled by nomination by the governor is not less than eight or more than ten for Madras, between six and eight for Bengal and the United Provinces, and either three or four for the rest. The result is that Madras has a maximum of fifty-six; Bombay of thirty; Bengal of sixty-five; United Provinces of sixty; Bihar of thirty; and Assam of twenty-two. The decidedly high franchise¹

¹ Women are qualified not only if they comply with the ordinary male qualifications but also as wives of men with certain specified qualifications. The governor may nominate any person resident in the province not subject to disqualification.

certainly assures that the members shall in the main be persons of substance and standing in their communities, well suited to act as an effective upper chamber. Congress was successful in a marked degree in the electoral results.

The Legislative Assemblies formed likewise the subject of further definition by Order in Council of April 30th, 1937. The provisions are extremely elaborate, and vary largely from province to province to meet local conditions. Thus in Madras in the case of Anglo-Indian and in Madras and in Bengal in the case of European constituencies with more than one member, the rule is that only one vote may be given to any candidate, though the voter has as many votes as there are seats to be filled. In Madras constituencies have usually but one member, but for the 146 general seats in five cases there are two, while in thirty two-member constituencies the second seat is reserved for the scheduled castes;¹ of twenty-eight Muhammadan seats four are in two-member constituencies; women have six general, one Muhammadan urban and one Indian Christian urban seats; two Anglo-Indians and three Europeans are returned by the whole province; there is a special constituency for backward areas and tribes with one member, eight Indian Christian seats, six seats for commerce, industry and planting, three being Europeans, six landholders, a University seat, and Labour six, making 215. In Bombay with 175 seats the general constituencies return 115 members, in constituencies varying from four to one seat, fifteen being reserved for the scheduled castes, one for backward tribes and seven for Marathas; there are twenty-nine Muhammadan seats, in single or two-member constituencies, two Anglo-Indian, three European, three Indian Christian, seven for commerce and industry, of whom three are for the Bombay Chamber of Commerce and the Trades Association, two landholders, seven Labour seats, the University seat, and six for women, one being Muhammadan. Bengal is in favour of one-member constituencies, the 117 Muhammadan seats following this rule absolutely; for the seventy-eight general seats there is a variation as thirty fall to the scheduled castes, so that twenty constituencies return two members each, and five three,

¹ For the definition of these castes see Government of India (Scheduled Castes) Order, 1936 (No. 417).

two being reserved; women have five, two general, two Muhammadan and an Anglo-Indian; Anglo-Indians three, Europeans eleven, Indian Christians two, commerce and industry nineteen in nine constituencies, landholders five, Labour eight, Calcutta and Dacca Universities one apiece, in all 250.

In the United Provinces with 228 seats, 140 are general in one-member constituencies except for twenty which have two members each, one being reserved for the scheduled castes; the Muhammadans have sixty-four; women have four general and two Muhammadan seats; the whole province returns one Anglo-Indian, two Europeans, and two Indian Christians; commerce and industry have three representatives, and landholders six, Labour three, and the University one. The Punjab also adheres to single-member constituencies, for eighty-four Muhammadans, and thirty-one Sikhs; but to allow of eight seats for the scheduled castes, of the forty-two general members sixteen are returned in two-member constituencies; the whole province returns one Anglo-Indian and one European; two constituencies return Indian Christians, commerce and industry one, Labour three, landholders five, and the University one, while there is one general seat for women, two Muhammadan seats and one Sikh from Amritsar, a total of 175. Bihar with 152 seats adheres rigidly to single-member constituencies, Muhammadan thirty-nine, Anglo-Indian one, European two, Indian Christian one, commerce, industry, mining, and planting four, landholders four, Labour three, the University one, women four, one Muhammadan, but of the general constituencies with ninety-three members twenty-two have two members, to allow of the election of fifteen representatives of the scheduled castes and seven of backward areas and tribes.

In the Central Provinces and Berar with 112 members there is also rigid adherence to one-member constituencies, except that twenty of the eighty-four general seats are reserved for the scheduled castes, and there are therefore two-member constituencies; Muhammadans have fourteen seats, women have three general seats, backward areas and tribes one, the province returns an Anglo-Indian and a European, there are two commerce constituencies, one for Berar, three seats for landholders, two for Labour and the University seat. Assam has 108

members; there are forty-seven general seats, seven reserved for the scheduled castes, with one three-member and six two-member constituencies; there are thirty-four Muhammadan constituencies, with one member each, and constituencies for one woman, one European and one Indian Christian; four backward tribal (plains) constituencies, five back areas (hills) constituencies; a European planting constituency with seven seats, and two Indian one-member constituencies; one seat each for European and Indian commerce and industry; and four for Labour. The North-West Frontier Province has all its fifty seats in one-member constituencies, save Peshawar City with two Muhammadans; there are only nine general, thirty-six Muhammadan, three Sikh, and two landholders, without a woman. Orissa with sixty members has single-member constituencies save as required¹ to provide for six seats out of forty-four general seats for the scheduled castes; and one seat for a representative of backward tribes, who have also four nominated representatives; there are four Muhammadans, two women, an Indian Christian, a representative of commerce and industry, two landholders, and one representative of Labour. Sind, also with sixty members, adheres to one-member constituencies, save for its two landholders elected by the whole province; there are eighteen general seats, thirty-three Muhammadan; two seats for women, one Muhammadan; two for Europeans; one each for the Karachi Chamber of Commerce and Indian commerce; and one for Labour in the registered factories. In all cases the representation of Labour has had to be devised with great care in order to secure as far as possible effective representation of genuine labour. Thus where trades unions are concerned it has been necessary to give the governor the power to decide in his individual judgment from time to time what unions to recognise, and to discontinue recognition. The choice of suitable constituencies has been elaborately devised to give effective representation if the workers so desire.

✓ The general rule of voting is that, where there are more seats than one to be filled, the voter has as many votes as seats and may distribute them as he pleases. The idea of proportional representation or even preferential voting was properly

¹ One constituency has three members, all general.

abandoned as impracticable. In the case of seats for the scheduled castes the candidates fall to be chosen to the number of four for each vacancy by a primary election of voters of these castes, but it is provided that the second election by the general constituency shall proceed, though there is a smaller number of candidates chosen. If the candidates equal the number of seats reserved all are declared elected; if more, the voting decides; if fewer, the governor in his individual judgment may call for an election by the constituency within a prescribed time; if there is then failure to elect, he has discretion if and when to ask for a new election. This principle applies also to elections for the seats reserved in Bombay for Marathas; to those reserved for representatives of backward areas or tribes; and to the seat for an Anglo-Indian woman in Bengal. In the primary elections for scheduled caste seats the voter has only one vote, though a maximum of four candidates is provided for. A member of a scheduled caste is in a favoured position in a certain degree, for, except in Bengal, if he fails to be elected as a candidate at the primary election for the reserved seats, he may still take his chance of election to a non-reserved general seat. In Bengal this is prohibited, except in the case of a by-election at which no reserved seat falls to be filled. The general rule emphasizes in a desirable manner the fact that members of these castes, though special provisions is made for them, still fall within the general body of Hindus, a point which was the driving force in the settlement of the issue obtained by Mr. Gandhi's efforts, the danger being that the members of these castes might otherwise turn to Christianity or some other non-Hindu religion.

The principle is normally adopted that for all non-general constituencies those eligible to election must be voters therein. The alternative of permitting election of other than members of each category had to be laid aside, since it would have aroused conviction that the true views of the special constituencies would not be represented.

The decision as to nomination, holding of polls, and other matters connected with elections is given to the governor in his discretion, though legislatures may determine the intervals which must intervene between successive stages of an election.

If a candidate is elected for more than one seat in the legislature, whether Council or Assembly, he must choose for which he will sit for within a specified time, and if he fails to do so all his seats become vacant.

As regards election petitions provision has been made by the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order 1936¹ for their presentation by any candidate or elector on any ground, or by an officer empowered by the governor exercising his individual judgment on the ground that the election has not been free in view of a large number of cases of bribery or the exercise of undue influence. A petitioner may also claim a declaration of his own election on the ground that in fact he received a majority of valid votes, or would have done so but for votes obtained by the returned candidate by corrupt practices. The governor decides in his individual judgment whether the petition complies with the prescribed requirements, and if it does refers it to three commissioners whom he chooses, who are, have been, or are qualified to be High Court judges, and they may require the assistance of the advocate-general. The commissioners may decide whether or not the election is void by reason of corrupt practices, or disregard of the rules affecting election, or bribery or undue influence, and the governor must issue orders thereon; no appeal is allowed. Provision is also made as to corrupt practices, penalties therefor, including disqualification for voting, being elected, or serving as an election agent. Details on these matters may be regulated by legislation.

The advent of responsible government has naturally made a fundamental difference in the position of the Imperial Parliament, and on June 17th the Prime Minister formulated the extent of the change. As regards the central government, of course, pending federation matters remain *in statu quo*, the fiscal convention also standing intact despite the grave results therefrom to Lancashire. But, in the case of the provinces, so far as ministers are responsible, the House of Commons cannot properly criticize their action or deal with it by question and answer, for *ex hypothesi* the secretary of state is not responsible nor can he intervene. To the extent, however, to which the

¹ July 3rd, 1936, No. 675.

governor's special powers are involved and to the extent to which he acts without consulting, or otherwise than on the advice of, his ministers, he is liable to direction and control by the governor-general and the secretary of state, that is ultimately by Parliament. Admissibility, therefore, of questions should therefore be subject to the guiding principle that 'such questions ought not now to be regarded as in order unless it can be shown either that the action at issue was taken by the governor without consulting his ministers, or against their advice, or, alternatively, that the governor was in possession of powers applicable to the case which in fact he failed to exercise.' But the right should be used with discretion and restraint, and His Majesty's government must also exercise a careful discretion as to the expediency in each case of giving information, for provincial government could only work well if the new distribution of responsibilities were frankly recognized. Mr. Chamberlain also insisted that the rule should apply even to a minority ministry so long as it was in office. The propositions thus laid down are patently sound; obviously there might be serious inroads on the rights of ministries, were it to be regarded as proper constantly to ask or explain why the governor failed to use his special powers to veto action. Questions will be far more legitimate when it is a case of a governor dissenting from ministers. Ministers will always have the right to act on the precedent decisively set in New Zealand in 1892¹ when the governor refused to add twelve members to the upper house to place its representation there on a reasonable footing, and when, declining his suggestion of resignation, they decided to remain in office but to appeal to the secretary of state for the colonies. Their reasoning was beyond question; if it was the governor's duty to reject their advice, equally it was their duty to remain in office pending the decision of the final authority.

It must be remembered that, as the Speaker made it clear, the Prime Minister did not purport to lay down any rules as to the right to ask questions, which is a matter for the Speaker to decide, but he indicated clearly the principles which would govern the ministry's decision as to when questions should be answered, and with what fullness. Mr. Churchill evidently

¹ Keith, *Responsible Government in the Dominions* (ed. 1928), i, 457.

held that a very wide range of questions would be justified by the consideration that the use of British or Indian troops might be requisite as a result of acts or omissions by governors, but plainly such a doctrine might be used to confine, as desired by Mr. Churchill, ministerial freedom within very narrow limits. The new principles simply follow what has been the practice in regard to the Dominions, where indeed the doctrine has been carried so far as to preclude discussion of legislation of the Union of South Africa which was open to the interpretation that it aimed at transferring to the Union government the power to take over the government of the native territories, though the South Africa Act, 1909, accords such authority only to the King in Council.¹

2. THE CENTRAL GOVERNMENT AND LEGISLATURE

It was deemed proper on the coming into operation of the transitional system pending federation to reappoint the governor-general formally to the new post provided for in the Act, which, it must be remembered, is distinct from the office of representative of the Crown for the exercise of the functions of the Crown in its relations with Indian states, though the governor-general was appointed to that office by a distinct instrument, also under the sign manual and signet. It became, in view of the formal separation of the offices, necessary for the express grant to the representative of the Crown of those authorities in the matter of foreign jurisdiction hitherto exercised by the governor-general under the Indian (Foreign Jurisdiction) Order in Council, 1902. The change² is essentially one of form, not of substance.

It cannot be said that any change has been manifested in the attitude of the government towards the legislature as an accompaniment of the existence of responsible government in the provinces. The legislature has remained aloof from the government, nor has it proved very helpful in the difficult situation caused by falls in revenue from customs, income tax,

¹ Keith, *Letters on Imperial Relations*, 1916-35, pp. 169, 170; *The King, the Constitution, the Empire, and Foreign Affairs*, 1936-7, p. 88.

² Indian (Foreign Jurisdiction) Order in Council, 1937 (March 18th, No. 251).

and currency and extra expenditure due to the constitutional changes.¹ The separation of Burma involved loss of revenue to the extent of rs. 3.38 lakhs and saving in expenditure of 92 lakhs. This allows for the annual contribution of rs. 2.29 lakhs by which in forty-five years Burma is to discharge her debt to India, and 94 lakhs in respect of pension contributions which will diminish annually and be extinguished in twenty years. Provincial autonomy involved a loss of 51 lakhs revenue and an increase of 1.34 lakhs expenditure. For 1937-8 the expenditure of rs. 83.41 lakhs was expected to exceed revenue by 3.42 lakhs, but after deducting the balance in reserve a net deficit of 1.58 lakhs remained. It was proposed to make good the deficit by increasing the duty on silver and the sugar excise. The assembly however, declined to accept the change in the excise, and it was necessary for the governor-general to pass it by certification.

The grant of provincial autonomy has necessitated a change in the system of loans. No further loans will be granted from the provincial loans fund set up in 1925 which will be wound up. In future the provinces will borrow on the market, through the Reserve Bank. In exceptional cases direct loans will be made on terms fixed in view of the circumstances of each case by the central government, which will charge for its expenses and the risk involved. It will normally not lend to meet budget deficits. The existing debts will be consolidated in the manner indicated in Sir O. Niemeyer's report,² and will be repaid in forty-five annual instalments of capital and interest, the former being applied to the reduction of debt.

As usual, the central expenditure is largely on defence. In 1936-7 the expenditure was put at rs. 45.45 lakhs, including 60 lakhs for rebuilding Quetta after the devastation by earthquake; in 1937-8 1.24 lakhs fell to be saved by the separation of Burma and Aden, and economies had been effected to give a total of rs. 43.87, but the commander-in-chief was seriously concerned at the deficiency of expenditure on defence. The situation was naturally worsened by the necessity of continuing operations in Waziristan³ on a very large scale, and some

¹ Sir James Grigg, Legislative Assembly, February 27th, 1937.

² Parl. Pap., Cmd. 5163.

³ Parl. Pap., Cmd. 5495.

friction was generated by the reluctance of the government to make a clear statement on the terms it was prepared to concede to the tribesmen. It was, however, made plain that no vital change of policy was contemplated,¹ and that it was not proposed to act on the suggestion that the definite bringing under control of the tribal areas should be set about. Whatever the advantages of such a course from the military and political point of view, considerations of cost are doubtless deemed prohibitive.² But it is natural that the legislature should resent its complete impotence to affect the attitude of the government on these issues. Of the expenditure according to Sir James Grigg's statement in the Assembly on August 25th about twelve crores (£9,000,000) is accounted for by the British part of the army, including expenses of transport and recruitment, and this sum could be diminished by about a half, were it possible to substitute Indian troops, but that at present is plainly not within practical politics.

The question of indianization and the relative position of British and Indian officers, debated as we have seen in 1934, was fought out once more on a further amendment of the Indian Army Act, 1911, necessitated by the bringing into existence of two kinds of reserve for the Indian army. The first is the regular reserve, composed of regular officers after retirement on pension or gratuity, the second is open to Indian gentlemen whose normal career is not military. It was plainly necessary to provide for the application of the Army Act to either category only when ordered on service for some duty for which he was liable as member of the regular reserve or of the army in India reserve of officers. Sir Cowasji Jahangir renewed the complaint³ that the Indian Army Act was confined to Indian officers while British officers fell under the Imperial Act, but the Secretary of the Defence Department insisted that no question of inferiority arose, that matters of command in any case were not suitable for enactment in an Act, and all that was necessary to confer on Indian officers command over British

¹ August 27th, 1937.

² *The Times*, June 18th, 1937. Some new roads and the creation of some protected areas where political agents would co-operate with a tribal council in settling disputes were decided on.

³ See p. 403, *ante*. Cf. Legislative Assembly, March 4th, 1937.

troops would be conferred by King's Regulation, the constitutional mode. But the Bill was carried only by 49 to 46 votes. Complaint was also made that no Air Reserve Force had yet been created and that the British Air Force numbered only 2,120 officers and men and the Indian Air Force but 1,479.

Much more serious was the attack directed against the alleged racial discrimination in the Indian Military Medical Services,¹ the claim being made that the spirit of Queen Victoria's promise against such discrimination was being violated. In fact in 1928 the peace establishment was fixed at 270 British and 132 Indian officers, and the 1936 change reduced the former by fifty and added twelve to the latter. It would have been possible to decrease the former number and to employ a rather larger number of Indian officers, but the result would have been that they would have required a larger number of British officers on the outbreak of war, and it would, therefore, have been necessary to require the provinces to employ a larger number in the war reserve. The local governments had been consulted and had been emphatic that the provinces should be left as free as possible to appoint their own men, and not to be compelled to employ either British or Indian members of the Indian Medical Service. As it is the civil branch recruited from the military branch to serve as a reserve is fixed at 220 minimum with 166 British.

In one matter a real effort to co-operate has been made with some measure of success. In accordance with an assurance given on the occasion of the despatch of troops to Addis Ababa during the Italian attack on Ethiopia, the governor-general invited on August 21st, 1937, the presence of the leading members of the assembly to acquaint them with the situation in the Far East and to inform them of the intention to despatch troops from India. This action won modified approval from Mr. Bhulabhai Desai and Mr. S. Satyamurti² who stressed the fact that the troops would be used for the protection in large measure of Indian nationals, and that units largely indianized had been expressly chosen, the two battalions selected having twenty-seven Indian officers out of forty-four. The attitude of

¹ Legislative Assembly, March 31st, 1937.

² The leader of Congress in the Assembly and his deputy.

Congress on this head was attacked by Mr. Sarat Chandra Bose who claimed that internal security among the British subjects, including Indians at Singapore and Hong Kong, was a British not an Indian interest, and who stressed the fact that the troops once despatched passed from Indian control. The contention seems inadmissible; both in Hong Kong and Singapore Indian interests are important, and the British government has unequivocally asserted its determination, as always in the past, to protect Indians who may suffer in the Sino-Japanese dispute, and to press their claims for losses inflicted.¹ A genuine case of co-operation seems to be made out. Moreover, in this case the feeling of Congress in favour of China is in accord with that of the British government, which has lost no opportunity of making clear to Japan the regret felt in Britain at events which in its opinion preclude the carrying out of fruitful conversations such as had been proposed on the eve of the Japanese aggression at Shanghai and in Northern China.

In external relations the legislature has been divided on the issue of the steps to be taken to aid the Indians in Zanzibar against legislation unfavourable to their position especially in the cloves trade. But the attitude of the government which, while not satisfied wholly with the undertakings of the Zanzibar government, accepted the concessions² made as a basis for accord was approved by the legislature by a narrow majority, thanks to Mr. Jinnah and his Muhammadan followers rendering it support. Whether India secured all that was possible or not must remain a matter of opinion, but of the anxiety of the government to secure justice for Indians there can now be no doubt. On that issue European opinion is in harmony with Indian.

The accord with the Union of South Africa achieved in 1927 has undergone a severe strain with the gradual hardening of General Hertzog's policy in favour of drawing a rigid line between Europeans and non-Europeans. No progress has been made in assimilation of the rights of Indians to those of Europeans, and, in addition to proposals sponsored by the

¹ So in Abyssinia strong protests were made with some success against the unfair treatment by Italy of an Indian firm (Mahomed Ali & Co.).

² Clove (Purchase and Exportation) Decree, 1937; Indian Government communiqué July 26th, 1937.

Nationalists¹ to secure legal prohibition of intermarriage with Indians, the employment of Europeans by Indians has been attacked, and governmental favour shown, despite protests by India, to legislation to prohibit Indians to employ European women, thus marking Indians as an undesirable race, inferior to Jews or Cape Malays. The inconsistency of these steps with the principle of the settlement is plain, and it does not appear that the Union government is prepared to pay serious attention to the views of that of India. The continuance within the same Commonwealth of races which cannot be treated as on the footing of equality presents, it is plain, remarkable difficulties, and the decision of the British government to allow recruitment of Dominion subjects for the Indian Civil Service, despite the ban in the Dominions on Indian immigration, is a clear denial of Indian rights of equality.

The proposed partition of Palestine² has naturally evoked protests from India, where the unfair treatment of the Arabs as Muhammadans in favour of the Jews is strongly resented, as in Iran and Iraq. Though the Hindus are not directly affected by the issue, they naturally share the views of their compatriots, indicating a very considerable amount of solidarity in Indian national feeling.

The interrelation of the central and provincial governments has been shown in the difficult question of the efforts of convicts in the penal settlement in the Andaman Islands to force concession of a demand for repatriation and the release of all détenus and political prisoners in British India. The Viceroy explained that it was impossible to accept the principle of concession to hunger-strikers, and insisted that the convicts were men convicted of grave crimes, against whose activities it was necessary to protect the community, stressing the fact that they had shown no sign of repentance of their past misdeeds. The Assembly on August 25th censured the attitude of the government, and some confusion arose, as it was stated for the government that repatriation would be carried out if desired by the government of Bengal, but on August 26th it was announced that repatriation could only be ordered by the

¹ Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936-7, pp. 118-20.

² Parl. Pap., Cmd. 5479 and 5513.

central government which could not consider any proposals while a hunger-strike was being carried out. The motive for mercy, of course, is simply the fact that great political changes have been carried out, and clemency is therefore possible as a gesture towards co-operation, the principle which has been accepted by the Congress ministries in the provinces in releasing persons under imprisonment within their jurisdiction.

The Railways Enquiry Committee under Sir Ralph Wedgwood suggested that the railways should create a reserve fund, and should no longer be looked to as a source of relief to general taxation. This proposal if literally carried out would have affected the sums payable to the provinces under the Niemeyer scheme,¹ but the government intimated on August 27th that, however the surplus might ultimately be treated, no change would be made in the sums payable to the provinces. The government further made it clear that European personnel would not be engaged except in cases where it was really required for efficient operation of the railway system.

With the advent of autonomy the Burman element of the Assembly, four in number disappeared, leaving the Assembly with 102 elected and thirty-nine nominated members. Congress with forty-five members and nine Congress Nationalists, who repudiate totally the Communal award and desire to eliminate it without Muhammadan consent, which Congress desires to secure, is capable of effective criticism of the irresponsible executive which fails to show much responsiveness to Congress demands, even when supported by the Muslim Independents under Mr. M. A. Jinnah. It is, however, significant of the value of experience even in the Assembly that of the seventeen members who left it for the provincial field, five became chief ministers, two ministers, and one a president of a house of the legislature. It is easy to understand the reluctance of the party to acquiesce in the refusal of any measure of responsibility, unless accompanied by the introduction of a disproportionate strength of nominees of the princes, all probably opponents of democracy.

By the Government of India (Audit and Accounts) Order,

¹ Government of India (Distribution of Revenues) Order, 1936 (No. 676), s. 6 (3).

1936¹ provision is made for the Auditor-General under the control of the governor-general and the governors exercising individual judgment to audit federal and provincial expenditure, and to ascertain whether sums disbursed were both legally available, and conformed to the authority given. He must also audit accounts as to debt, deposits, sinking funds, advances, suspense accounts, and remittance business, and trading, manufacturing, and profit and loss accounts kept in any department. He may be authorized, or required, to audit the receipts of any department or accounts of stores and stock. He must report annually giving a statement of the accounts of the federation and provinces for the preceding year, with particulars of balances and outstanding liabilities, and such other information on their financial position as the governor-general may direct, thus enabling him to discharge his obligation regarding financial security of India. He must also submit to the governor-general and the governors each year accounts showing receipts and disbursements, including appropriation accounts of the sums specified in the schedules of authorized expenditure authenticated by the governor-general or governors respectively under ss. 35 and 80 of the Act of 1935. He is given due authority to inspect books of account and other documents, with the exception of such as are certified by the governor-general or governor to be secret, in which case a statement of the facts in the book or document must be certified by the governor-general or governor. The Auditor of Indian Home Accounts is given like duties and authorities regarding home accounts, the secretary of state or high commissioner having similar authority and obligation as regards secret books or documents. He is subject to the general superintendence of the auditor-general. From the auditor-general's functions are excluded defence and railway accounts and the governor-general or governor may relieve him from responsibility in respect of other accounts.

The punctual performance of duty by the auditor-general is assured by his salary of 60,000 rupees, and by his being required to undertake not to accept employment after retirement, normally at age fifty-five, in India without the governor-

¹ December 18th, No. 1328. Various transitory provisions and those as to date of commencement of the parts of the Act are contained in Orders in Council, July 3rd and December 18th, 1936, Nos. 672 and 1322.

general's assent. But no penal sanction is provided for such action.

The position of the Indian Civil Service has been markedly affected by the decision to reduce competition by Indians at the examination in London, and to fill a certain number of posts by selection without examination. Naturally, the reiterated assertion of the intention of the government to secure the position of the service has increased its popularity. Thus in the examination of 1937 the entrants numbered 189 Europeans and 149 Indians as against 145 and 248 in 1936, and 83 and 251 in 1935. Of the European entrants 100 were also candidates for selection, and 133 were candidates for selection only. There can be no serious doubt that the necessity of resorting to selection must lower the standard of capacity of the civil service, and that it will be increasingly difficult to justify the very high salaries which are drawn by men of inferior capacity and much less responsibility than their predecessors, though the difficulties inherent in their position under the new system render attractions necessary to secure European candidates.¹ That the existing civil servants are co-operating loyally with ministers has already been observed, and Mr. Satyamurti has promised them fair play and justice from Congress ministries, while they are loyal and carry out the policies of ministers. On the other hand, it is natural that, when ministers accept rs. 500 a month as adequate salary, though many of them sacrifice large professional earnings to do so, resentment should be felt at the burden of high pay and allowances and of the exemption of these matters, as well as of the number of Europeans to be employed and the posts in which they are to serve, from the control of the legislatures. Nor is it unnatural that the delay in the operation of Indianization causes substantial resentment, while greater powers for the Public Service Commission have been asked for.

The federal Court was brought into being from October 1st, 1937, in anticipation of federation,² while from April 1st, 1937, the Council of the Secretary of State disappeared, its place being taken by advisers as provided by the Act. To secure the

¹ Cf. Sir E. Blunt, *The I.C.S.* (1937), pp. 258 ff.

² Order in Council, July 29th, 1937 (No. 703).

inauguration of the new system for Sind and Orissa the central government determined the limits of the new provinces, giving to Orissa parts of Madras and the Central Provinces, apportioned assets and liabilities, assigned staff, and appointed the high court at Patna as the court for the whole province as created. Government was temporarily carried on by the governors, with advisory councils only with consultative powers on finance, legislation being supplied by the governor-general in council under s. 71 of the Government of India Act. For the brief period before the new regime reductions were effected in the legislatures of Bombay, Madras and Bihar.¹

Substantial changes in application of legislation have been necessitated by the separation of Burma and Aden, and effect is given thereto by the Government of India (Adaptation of Acts of Parliament) Order, 1937.² 'British possession,' when used in relation to the British territories in India means British India as a whole, and in relation to British India or India 'governor' means governor-general. But the term 'governor-general' since April 1st, 1937, includes a governor of a province acting under any authority given by Part VI of the Act of 1935, and 'Indian legislature' includes the authority capable of making laws for the relevant part of British India. Full recognition is given to Burma as a distinct possession, not however subject *inter alia* to the Colonial Laws Validity Act, 1865, but bound by the many Acts applicable to India. The Merchant Shipping Act, 1894, the Army Act, and the Air Force Act are among those adapted and full recognition is given to Burma forces and Burma military law. The high court of Rangoon receives recognition, and its judges are to be eligible to sit on the Judicial Committee on like conditions to those of India.

More important is the assertion that the Indian Church Act, 1927, is not to be affected in its application by the Government of India Act, 1935, and is still to have effect in Burma and Aden. Should the governor-general find it necessary to certify that the Indian Church is no longer in communion with that of England,³ then he shall send a certificate to the Governor of Burma, who

¹ Orders in Council, Nos. 165 and 164, March 3rd, 1936.

² March 18th, 1937 (No. 230). Indian Acts have been adapted by Orders in Council, March 18th and July 29th, 1937 (Nos. 269 and 702).

³ See p. 413, *ante*.

will be at liberty to resume complete control of maintained churches or burial grounds situate in Burma, and the Indian Church shall cease to have any rights therein. Similar provision is made as regards Aden, and chaplains under the Government of Burma Act, 1935, are assimilated in position to those in India. Divorce in Burma of persons domiciled in England or Scotland will still be possible under the terms of the Indian and Colonial Divorce Jurisdiction Act, 1926. British Burma will be placed in the same position as regards naturalisation as British India, for which a new Order in Council¹ was issued in 1936. It is expressly provided that the dissolution of the council of India shall not affect the position of debenture or other stocks under the Trustee Act, 1925, or the Trusts (Scotland) Act, 1921.

In the field of foreign affairs proper, which are dealt with finally by the governor-general, the legislature has evinced increasing interest. The League of Nations has been criticized sharply both in the Council of State² and in the League Assembly,³ motions having been put forward in favour of termination of membership. The grounds alleged include the ground, accepted also by the government, of the excessive cost of the League in comparison with the benefit thence derived, in view of the fact that few Indians obtain League employment. Another grievance affects the failure of India to obtain an elective seat on the Council, though that is the inevitable result of the fact that Indian government is under final control by Britain. The conduct of the affair of Italy and Abyssinia was described with commendable if embarrassing frankness by the Secretary of the Legislative Department as having exhibited nothing but sheer futility, a just rebuke to the British Government's leadership⁴ in the abandonment of sanctions; but excuses could be found. Sir Abdul Hamid from his experience of membership of the Indian delegation to the twelfth Assembly stressed the real independence of the delegation, which consulted with the League experts of the India Office, met at

¹ British Nationality and Status of Aliens Regulations (India), December 8th, 1936 (No. 1418).

² April 2nd, 1937.

³ September 22nd, 1937.

⁴ Keith, *Letters on Current Imperial and International Problems*, 1935-6, pp. 182-97.

Geneva the other delegations and so far as possible co-operated, and in political matters followed the British lead, but in other affairs expressed freely Indian views and profited by service on committees. It was also pointed out that it would be folly to abandon the League when the U.S.S.R., Turkey and Egypt had been glad to accept membership. It was agreed to secure further reductions of cost when possible, Lord Lytton as early as 1928 having stressed the unfairness of the then allocation; something, however, has already been done, India's share having been reduced to 53 out of 935 units as opposed to an original 65, and in the revision of 1925 to 56 out of 937.

In the Labour Organization India's place is assured, but difficulties have arisen as to the acceptance of the numerous conventions negotiated and recommendations made by the Labour Conference. It has been impossible for obvious reasons to accept the reduction of hours of labour to forty, or holidays with pay, or the international scheme for the maintenance of rights under invalidity, old age, widows' and orphans' insurance. A new procedure has been adopted in consequence of the waste of time and delay of the former practice of moving resolutions in each case. Henceforth when it is proposed to accept a convention, legislation will be brought down; when any other action is proposed, a resolution will be moved, and, even when no action is recommended, a resolution may be moved. In all cases the conventions and recommendations will be laid before the legislature with a short statement of the attitude of the government thereupon. The procedure seems immune from the criticism of reducing the rights of the legislature.¹

The approach of India to Dominion status is seen in the fact that matters of foreign interest requiring legislation are brought before the legislature, after agreements have been accepted on behalf of India in the ordinary way through a negotiator duly authorized by the British Government. Thus in February, 1937, was brought forward the Indian Naval Armament (Amendment) Bill to give authority for the carrying into effect of the London Treaty of 1936.² The procedure followed the model already adopted in the case of the Washington

¹ J.P.E., xviii, 450.

² Parl. Pap., Cmd. 5136. The Parliamentary Under-Secretary signed for India.

Conference treaty of 1922 and the London treaty of 1930. It was admitted that *prima facie* the legislation was unnecessary in view of the position of India in regard to naval preparations, but the like action by those Dominions which accepted the treaty was adduced as a proper ground for similar legislation. Moreover, the Geneva Convention Implementing Act was passed on February 29th to give effect to the Geneva Convention of 1929 which forbids use of the Red Cross emblem by societies or firms not connected with the Red Cross Society. The earlier convention on this topic was dealt with by Imperial Act only, the Geneva Convention Act, 1911. Of practical importance, on the other hand, is the Arbitration (Protocol and Convention) Act which gives effect in India to the Protocol on Arbitration Clauses and the Convention on the Execution of Foreign Arbitral Awards to which India is a signatory. Necessarily, of course, as in the case of Labour Conference conventions, the government and legislature can as a rule act for British India only, though the government in special cases could secure the accession of Indian states. Thus the London Naval Treaty of 1936 was concluded for India *simpliciter*, and must bind the States, paramountcy being available for its enforcement in the incredible event of any state seeking to evade it. The distinct personality of India is also seen in the terms of the exchange of notes of April 9th, 1935,¹ for the definition of the boundary between Burma and China. To this treatment importance attaches as enhancing the status of India in the eyes of the world.

It must be noted that the Congress demand for independence has been strengthened by the recent developments in the Irish Free State resulting immediately from the royal abdication. Mr. de Valera took the opportunity of eliminating the Crown from all connection with the internal government, by passing the Constitution (Amendment No. 27) Act, 1936, and by assigning to it merely formal participation in the appointment and accrediting of diplomatic representatives and consuls, and the making of treaties. The same rule applies under the new Constitution of Eire, approved by plebiscite on July 1st, 1937. Otherwise there is no connection between Eire and the British

¹ Parl. Pap., Cmd. 4884.

Commonwealth of Nations, so far as law is concerned.¹ Clearly, if that is regarded as consistent with Dominion status, it would meet any reasonable interpretation of the demand for independence, which in any case must remain a distant ideal, so long as India is plainly unable to defend herself without the aid of British military, naval and air forces.

3. THE STATES AND FEDERATION

The Congress majorities in the provinces have naturally been used to protest against the scheme of the Act of 1935 and to press for the summoning of a constituent assembly to devise a constitution for India. The objections of Congress to the federal scheme are clear and natural. Not only has it never been approved by Congress, but it is more and more apparent that the essential aims of the princes run wholly counter to the ideal of democratic self-government which finds expression in the provinces. Similarly, on August 3rd, 1937, in the Legislative Assembly opposition members urged the government of India to consult with the Assembly before reaching agreement with the princes on the terms of accession to the federation, but, naturally, without securing any assent to their claim.

The idealistic conception of federation² is that which attracted the Joint Parliamentary Committee and which was summed up by the Viceroy in addressing a joint session of the central legislature on September 13th: (1) the early establishment of a constitutional relationship within the federation sphere between the states and British India is of the utmost importance from the standpoint of the maintenance of the unity of India; (2) the existence of a central government capable of formulating economic policies affecting the interest of the sub-continent as a whole has direct immediate relevance to the economic circumstances of the India of to-day. To secure federation the Viceroy expressed readiness to face anomalies as necessary and inescapable incidents of any attempt at any date at federation, while he stressed the hindrance to economic and industrial

¹ Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936-7, pp. 53-5, 62-4.

² Cf. Maharaj Kumar Raghubir Singh, *Indian States and the New Regime* (1937).

development caused by the absence of uniformity in company law, banking law, the law of copyright, trade marks, and the like. Moreover, unity and uniformity as far as possible should be established in the whole fiscal field, and British India no less than the states would profit by the establishment of a system under which tariff policies affecting every part of India would no longer fall to be constructed by a central government in whose counsels, for constitutional historical reasons, wide areas of India enjoyed no representation. For the princes these reasons, doubtless, have weight, but the problem naturally presents itself to them in the simpler form of an enquiry to what extent they can secure authority in central subjects, at the cost of minimum loss of authority in these matters, while at the same time excluding as far as possible not merely federal but also Crown influence on their internal affairs. There is no reason to doubt the sincerity of the objections of the princes to democracy or of their belief that benevolent autocracy is far better suited to the genius of the Indian people.

Nonetheless the conflicting view of British India must be noted. Congress naturally holds that any system which denies the possibility of democratic progress in the states, and safeguards the princes from pressure for reform, is unsound, and it recognizes that the princes are being urged to federate by the British government with a view to their representatives forming a solid conservative bloc in the federal legislature, which will effectively counteract any undue tendency to democracy in the states. Moreover, the existence of such a bloc may be relied upon to preclude any advance to real responsible government in the vital spheres of foreign relations and defence which it is desired to retain in British hands. On the assumption that British India is not fit to face the responsibilities of democracy in any but the provincial sphere, the attitude of the British government is intelligible and natural, but equally it is incompatible with the whole standpoint of Congress and a definite clash of ideals is inevitable.

The process of ascertaining the views of the princes has been slow. In August, 1936, the Viceroy circulated to the princes a draft instrument of accession, and asked for observations within six months, announcing also the despatch of three

representatives to discuss the issue with the princes. A Conference of princes and ministers met in October and appointed a federal finance committee and a constitution committee to report in January. The former obtained the advice of Sir B. N. Mitra and Mr. Manu Subedar. The former insisted that the wide responsibilities of the Viceroy under the Act were incapable of being lessened by any instrument of accession, and he made it clear that, if a state thought it could more effectively spend its revenue than would be the case under federation, it should decline to federate. If, however, other advantages appeared to outweigh that consideration, it should make such sacrifice of revenue only as would permit the Crown to accept its instrument of accession. Mr. Manu Subedar stressed the fact that a state which made no reservations would find itself liable to all the taxes levied in the provinces; to the surcharges leviable by the federation under ss. 136 and 138 of the Act; and to new taxes to which the provinces were liable under ss. 137 and 140. Stress should therefore be laid on the fact that taxable capacity in the states was less than even in such 'deficit' provinces as Sind, Orissa, and Assam. The states, therefore, should refuse to accept any arrangement based on the view that they should pay equal taxation per head. The results of the constitution committee were to stress the necessity of weakening the position of the governor-general as an agent of the federation, and to require that he should use in his capacity as representative of the Crown his special responsibilities under the Act. Moreover, no authority beyond that expressly given in the instrument of accession should be exercised by the representative of the Crown, and the instruments should be given statutory force so that no power not expressly therein conceded could be exercised. It will be seen that these views would, if given full effect, seriously limit the force of the Act. The Chamber of Princes met in February, 1937, to consider the issues and was invited by the Viceroy to accelerate decisions, but no definite progress was made in open session, though the election as chancellor of the Maharajah of Patiala in preference to the Maharajah of Dholpur by 30 to 13 votes indicated a definite leaning to the views of the constitution committee. An informal meeting of princes and ministers advocated general

acceptance of these views. It is understood that the replies of the princes to the enquiry of the Viceroy have been in the main based on that committee's report.

There are obvious criticisms of the princes' attitude even from the point of those who insist on the necessity of early federation. (1) The effort to minimise the function of the governor-general as agent of the federation is a serious breach with its principles. In federal matters the governor-general should act definitely from the federal standpoint, and it is wholly undesirable that he should be asked to exercise the special responsibilities and powers assigned in the federal scheme in his quite distinct capacity as representative of the Crown. (2) The further proposal that the governor-general in his capacity as representative of the Crown should not exercise any influence on the states in the interests of federation, plausible as it seems at first, goes too far. In that capacity the Viceroy doubtless must weigh the interests of the states against that of the federation, but his concern is with India as a whole, and, if he deems in a matter not actually included in the acceptance of federal authority by any state, that the interests of India demand closer co-operation with the federation than the state is willing to give, it might become his duty as representative of the paramount power to use his authority to require that it be conceded. It is natural that the states should desire to extinguish all possibility of the exercise of the paramount power, but it would be an injustice to their subjects if that were accepted by Britain. The British Government has always claimed and exercised the right to use its paramount power to require any state not to offend against the welfare of the rest of India. It cannot lay this right aside because of federation. (3) The efforts of certain states to reduce to a minimum their acceptance of federal subjects and of federal taxation should be jealously scrutinized, and entry to federation should be refused to any state which is not willing to accept for all important heads federal legislative and executive control. It may in some cases be proper to allow the administration of a federal subject to remain in the hands of a state, but only when the state affords conditions of control of such administration which ensure that it will be effectively carried out. Nothing would

be more destructive of true federalism than nominal compliance with federal law or the absence of any simple means by which the governor-general can enforce the needs of the federation. (4) It is imperative that no surrender be made by express words or implication of the full rights of control of the states by virtue of paramountcy to secure due regard to justice and the rights of the people. The recent cases of Alwar, whose late ruler was required in 1933 and 1936 to remove from his state and to remain away for at least eighteen years, of Jhabua, and of Dewas (Senior) show plainly that Britain must reserve full authority to secure reasonable government, since it cannot allow anarchy nor suppress risings against maladministration and tyranny without taking steps to abate the wrongs which provoke revolt. Further, Britain cannot indefinitely acquiesce in autocratic rule in the states. Holding that democratic rule is the right of the people of British India, it must sooner or later concede that the people of the states cannot be denied the boon. There is no moral injustice in this view. The states of India have already been guided along the path of modernization by degrees, and a further step in constitutional development is overdue. The Crown owes to the subjects of the rulers the duty of securing their progressive admission to share in their own government. To surrender this duty for the sake of securing a conservative federal legislature would be a failure in duty which would be unlikely to have lasting effects. The Indian princes command no wide hold on their subjects; the most important of them come from dynasties of no great duration, and their subjects are too close to British India to remain in placid content in those cases where government is unsatisfactory.

No doubt it is unsatisfactory that the British government has shown a marked tendency to make sacrifices to induce acceptance of federation, as in the case of the agreement of October 24th, 1936, under which the Nizam definitely consented as contemplated by the Government of India Act, 1935, to the assimilation of Berar to a part of the Central Provinces under the title of the province of the Central Provinces and Berar. Full recognition is accorded to the Nizam's sovereignty, the allegiance of Beraris is due to him, though for other purposes

they will be treated as British subjects. The pecuniary settlement is generous, and due regard for the interests of Hyderabad is required of the governor of the Central Provinces.

A clear and enlightened view of the position of the states is contained in the resolution of the National Liberal Federation at its Lucknow session when it reaffirmed its sympathy with the natural and perfectly legitimate aspiration of the people for civic and political liberties, and regretted the failure to provide for the election of the state representatives in the federal legislature and the recognition of fundamental rights of citizenship. It pressed for the concession by the rulers of election of the state members, and of rights of security of person and property; liberty of speech and of the press; freedom of association; and an independent judiciary as well as representative government as a prelude to responsible government. The picture of the just demands of the people may be completed by adding separation of private and state funds; control of the latter by the people's representatives; the establishment of an independent civil service; and the grant of rights of suit of the government on the analogy of British Indian practice. These concessions would leave to the rulers a useful sphere of influence and allow them to patronize, as they largely fail at present to do, the revival of Indian traditions in the sphere of the arts, and to assist in the essential transformation of Indian society by the progressive improvement of the status of the untouchables. In this regard a notable example has been set by Travancore in opening temples to the lower castes (1937).

One difficulty of importance in the evolution of federation has been stressed by Sir Shanmukham Chetty, Diwan of Cochin,¹ who frankly pointed out that progress pointed to the introduction of responsible government in the states. In this case, there might be difficulties between the paramount power and the state, if the former desired to exercise its over-riding authority in the interests of India as a whole against the opposition of a responsible ministry in the state. Under autocracy, of course, a prince can overrule his subjects, confident that if he acts on the request of the paramount power, it must uphold

¹ Cochin Legislative Council, February 13th, 1936; cited by N. D. Varadachariar in his valuable *Indian States in the Federation* (1937), pp. 152-6.

him against any hostility so excited. To adduce this consideration against the extension of democracy in the states is ingenious as giving the British government an incentive to support the views of men of such standing as the Diwan of Mysore¹ and the Maharajah of Patiala² who have too frankly avowed their hostility to any experiment with democracy 'the Nessus shirt of a discredited political theory' in India.

In a matter of some importance the Act of 1935 has left paramount authority as the only means of securing respect to its terms by the states. Their Courts are bound by the interpretation given by the federal court to any legislation on which the federal legislature has power to bind the state.³ But no appeal to the federal court in such a case is provided for,⁴ and, if the ruling of the court is disregarded, only intervention by the executive will be available to secure respect for it, a singularly unfortunate position, involving if applied executive interference by the ruler in judicial business.

The period of negotiation has been marked by many difficulties in the Chamber of Princes, which since 1926 has developed a substantial activity in an effort to become the recognized channel for the forming, enunciation, and presentation to the Viceroy and the British Government of the views of the princes on federation and other topics therewith connected. Under the Chancellorship of the Maharajah of Patiala (1926-31, 1933-7) the Chamber has developed certain new features, all in the direction of rendering it more independent of the government of India. The Standing Committee, which used to meet under the presidency of the political secretary to the Viceroy, now has the Chancellor as its spokesman, while the secretary presents the views of the government; moreover, informal preliminary meetings of the Committee prepare the way for the formulation of the Committee's views and are held without the presence of the political secretary. The establishment of a permanent secretariat added to the value of the work of the Committee, and the secretary was admitted as in attendance

¹ June 21st, 1934, cited *ibid.* p. 146, n.1. The state is, of course, very progressive, and the Diwan enlightened, as his published speeches abundantly show.

² Chamber of Princes, January 22nd, 1935; Panikkar, *The Indian Princes in Council*, p. 180. Patiala is by no means a model State.

³ s. 212.

⁴ Varadachariar, *op. cit.*, pp. 135, 136.

on the Chancellor with the right to speak if requested, thus providing the princes with a counterweight to the experience of the political secretary. In analogous manner there has been instituted an informal meeting of princes prior to the formal meeting of the Chamber, which can, therefore, be held in public unless specially otherwise provided for any item of business. Before the Conference is now laid a record of work done and duly audited accounts, while the agenda is now prepared by the Standing Committee which supersedes the political secretary in this regard, and approved by the Viceroy. Moreover, rules for the conduct of business secure more effective working of the Chamber.

The position, however, remains difficult, for the fundamental fact about the Chamber is its failure to secure the support and presence of the greater princes, while even in their absence there has been much dissent between the more important and the minor rulers, the latter resenting the preferential position of the former. Fresh annoyance has naturally been caused by the federal scheme in its allocation of seats to the rulers taking due account of the population as regards the number of seats in the Assembly, and of the rank and importance as indicated by the dynastic salute and other factors as regards seats in the Council of State. The claim of the large states, which has in substantial measure been conceded in the federal legislature, is for recognition of their special political importance, as opposed to the claim of lesser rulers that equality should be recognized as regards status and made the basis of representation. The Chamber of Princes has long been faced with demands from rulers for admission on the score that they had full internal powers or practically such powers, and therefore should join the existing members, and their cause has been championed by the Maharajah of Patiala on the score of justice. On the other hand equality of voting power is naturally enough unacceptable to Hyderabad, Mysore or Baroda. Any change,¹ however, to meet the wishes of the greater rulers seems out of the question. On the other hand, it is contended that only through discussion by some authoritative body can the princes secure a sound basis

¹ An interesting but clearly impracticable scheme of reform has been enumerated by Raghubir Singh, *Indian States and the New Regime*, pp. 399-412.

for action in the federal legislature regarding legislation on topics which fall within the federal sphere. It must be added that in this issue again the greater states are likely to be disinterested, for they will unquestionably be able to exclude from federal control such issues as they desire to a far greater extent than can the minor rulers. There is in fact no solidarity of interest between the greater and the minor states. Nor so far is there much evidence of solidarity of interest between the rulers and British India; the interests of the former seem essentially to lie in pressure on the British Government to make to them as the price of their adhesion to the scheme concessions inimical to the welfare of their people.¹

4. RESPONSIBLE GOVERNMENT IN BURMA

Burma was fortunate in being emancipated on April 1st, 1937, from the embarrassments of its connection with India and in starting on a career leading naturally to Dominion status. The elections to the House of Representatives, which replaced the former Legislative Council, were marked by great confusion of parties and policies, there being no very clear lines of division, though Dr. Ba Maw among others stressed his determination to obtain Burmese independence, if necessary by strong means, and also promised, if elected, to obstruct the working of the constitution with a view to this end. The ministry which at first held office found itself in March faced with a crisis, for the House, which had to consider the budget for 1937-8, declined supplies for important departments under the control of the finance member. The cabinet resigned following a vote of no-confidence, and a motion was brought for the removal of the newly-elected Speaker. The situation was clarified by the governor's action in calling on Dr. Ba Maw to form a ministry, for he felt it quite consistent to do so, with the purpose of using his new position to work for the attainment of his end. Nonetheless some misunderstanding arose between

¹ Mr. Panikkar's eulogy of the Maharajah of Patiala in *The Indian Princes in Council* shows the ruler as a convinced adherent of the belief in the capacity of the princes to continue successfully autocratic rule, a view wholly untenable in view of the recent history of Alwar, Kashmir, and Gwalior among major states.

him and Pandit Jawaharlal Nehru, who was understood to have regarded his action as inconsistent with earlier pledges, but accord between the two protagonists of independence for their countries was achieved. Dr. Ba Maw had to face also much opposition from members of the former government, and efforts by Burmans to defy the rule that speeches must normally be in English, unless that language was not easily used,¹ caused considerable friction. But the coalition which he headed was fortunate in the invitation early given for his presence at the Imperial Conference as well as the Coronation. At the Conference he ranked as an observer, like the two ministers who represented Southern Rhodesia, but he made the utmost use of his position to make it clear² that he expected Burma at no distant date not merely to have complete membership of the Imperial Conference, but also to obtain membership of the League of Nations, thus acquiring full Dominion status. It is probable that his visit and initiation into the mysteries of foreign policy were effective in winning his support for the maintenance of the connection of Burma with the Empire, which her exposure to foreign aggression, incited by her potential wealth and relatively scanty population, renders so essential. On his return his account of his achievements caused gratification to his supporters, who together with U. Chit Hlaing's party, the Arakanese, Anglo-Burmans, Indians, Karens and a few independents much outnumber the opposition, while the European group maintained its readiness to help any government which brought forward sound measures. Popular proposals included the reduction of the unpopular capitation and thathameda taxes and the appointment of fiscal and land revenues committees, whose reports were to be obtained before legislation was entered upon. A minor but useful constitutional reform involved the appointment of Parliamentary secretaries, especially useful in view of the existence of the upper chamber which was duly called into being.³ It is interesting to note that a proposal to pay members of the legislature was withdrawn on the ground that the electorate would not approve, and that modest sums were fixed for ministerial emoluments. The

¹ Government of Burma Act, 1935, s. 30.

² Parl. Pap., Cmd. 5482, pp. 60, 71.

³ Order in Council, April 30th, 1936 (No. 402).

Indian practice of introducing bills¹ and then circulating them for expressions of opinion was freely adopted, as regards the rich crop of bills brought forward by private members,² among which were useful measures to define Burman domicile, and to give legal effects to the marriages contracted *de facto* by Burman women with non-Burmans. The failure earlier to deal with this point is significant of the limitations of action incumbent on purely official governments.

The issue of defence has naturally demanded consideration, for Burma ceases to be part of India for defence purposes and the British Air Force there falls under the Air Marshal commanding in the Far East with headquarters at Singapore. The essential task of substituting Burmans for Indians in the battalions of the Burma Rifles is being faced, while the retention of two British battalions renders the situation for the time being secure. The Mounted Police already includes many Burmans, but the Frontier Force service is unpopular, because it operates in remote districts where Burmans find it difficult to obtain their wonted food and to enjoy social advantages. It is significant that the Frontier Force Act, 1937, had to be passed by the governor over the head of the legislature. It is not proposed to continue payment of any portion of the small contribution made by India for naval defence. But, excusable as this may be for the time being, in the long run Burma cannot properly refrain from making some contribution for the advantages of protection. The colonies and Malaya do so in generous measure and no excuse for inaction by Burma can well be imagined.³

As in India a measure of needless formalism has been shown. Thus the Counsellor⁴ refused to answer an enquiry in the House of Representatives as to whether the governor had made arrangements, as required by his instrument of instructions (Article xvii), as to consulting the finance minister as regards defence expenditure, on the score that it was not within his province to reply on a matter in which the governor's responsibility was to Parliament. It is, however, clear that common-sense would

¹ It is customary to allow any bill to be introduced.

² The Government holds that social Bills should be introduced by private members and readily gives time for their consideration.

³ Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936-7, p. 117.

⁴ One only has been appointed so far. See S.R. & O., 1937, No. 253.

have dictated the simple statement that the governor would, of course, give effect to the royal instructions. A better defence was forthcoming on the head of alleged delay in Burmanization of the forces. It was pointed out that a company of Sappers and Miners, 400 strong, to be wholly Burman in personnel, was being raised, that recruiting for the infantry would soon start, and that efforts to force the pace would be a failure.

An important step has been taken in the final adjustment with Siam of the Tenasserim boundary,¹ and of the boundary with China under the agreement of 1935² and the extension of administration over the Wa States, inhabited by savage tribes who presented a constant danger of raiding attacks, while opium smuggling can now be put down. The control of the area, of course, lies with the governor, though questions were answered regarding the heavy cost to Burma of the work of the delimitation commission. Burma has also had to provide for the cost of a defence department on separation from India, but not only does she receive free naval defence, but also defence by air.

The distinct position of Burma has been emphasized in the conclusion of a special treaty by the British government regarding trade with Japan,³ and Burmese representatives discussed with the British government the terms of an accord on trade to replace the Ottawa agreement.

The chief problem to be faced by Burma is the question of maintaining justice towards the non-Burmese elements of the population, especially the Indians and the Europeans, both of which elements have contributed largely to the development of Burma. For the time being immigration from India is regulated by Order in Council,⁴ but despite safeguards the essential decision as to fair treatment will rest with the legislature. There have been signs of readiness to legislate unfairly, as in the proposal to deny Europeans and Indians their due share of authority on the Rangoon Municipality, but it may be hoped that this tendency will not be allowed to develop in a country which, by reason of its potentialities, offers wide scope for fruitful

¹ The question of nationality of persons affected by the delimitation was dealt with in an exchange of notes, March 31st, 1937. See Parl. Pap., Cmd. 5475.

² Parl. Pap., Cmd. 4884.

³ Parl. Pap., Cmd. 5504, London, June 7th, 1937.

⁴ March 18th, 1937 (No. 254).

co-operation between its numerous component elements. While trade relations with India have been maintained on a stable footing for the time being by authority of the British government,¹ Burma naturally must soon receive fiscal autonomy as regards India, for Indian and Burman interests are far from being the same.

The secretary of state for India has been appointed secretary of state for Burma also, and has his own establishment distinct from that of India, and a Parliamentary Under-Secretary, who clearly cannot be regarded as holding a full-time post.² As in the case of India the new constitution has demanded many legal adjustments. In addition to adaptation of both Acts of Parliament and local Acts,³ it has been necessary to apply the Official Secrets Act,⁴ and the Medical Act, 1886,⁵ to adapt the Fugitive Offenders Act, 1881,⁶ to give effect throughout the Dominions to the Extradition Act of Burma (Chapter IV) as if it were part of the Fugitive Offenders Act, and to provide that Chapter II shall have effect in British Burma as if it were part of the Extradition Act, 1870.⁷

5. ADEN AS A COLONY

From April 1st, 1937, Aden became a colony, and by Order in Council of September 26th, 1936, provision was made for its government by a Governor assisted by an executive council, but without a Legislative Council, the legislative power being given to the governor alone. The existing District and Sessions Court became a Supreme Court, but appeal lies to the High Court at Bombay, with a further appeal either as of right under conditions defined in the Order to the Privy Council or by special leave of that body. The appeal applies to important

¹ Order in Council March 18th, 1937 (No. 268); for monetary arrangements, Order, March 18th, 1937 (No. 267); for audit and accounts, Order, December 18th, 1936 (No. 1327).

² Ministers of the Crown Act, 1937.

³ India and Burma (Existing Laws) Act, 1937; Adaptation of Laws Order, March 18th, 1937 (No. 265); July 29th, 1937 (No. 701). See also p. 502, *ante*.

⁴ Order in Council, April 23rd, 1937 (No. 407).

⁵ Order in Council, March 18th, 1937 (No. 274).

⁶ Order in Council, July 29th, 1937 (No. 724).

⁷ Orders in Council, July 29th, 1937 (Nos. 725 and 740).

criminal cases, and no capital sentence may be executed unless confirmed by the High Court.¹

The royal instructions impose certain limits on legislative power. Normally one month's publicity of a proposed Ordinance must be accorded before enactment and the authority of the colonial secretary is requisite for the imposition of export or import duties or additional taxation or affecting the number, salaries or allowances of public officers, in addition to the restrictions normal in colonies. The power to legislate is also reserved to the Crown in Council, as well as that of disallowance. To the governor by the Aden Protectorate Order 1937 is entrusted control of the protectorate, bounded on the south by the colony, on the west and north by the Kingdoms of the Yemen and Saudi Arabia, on the east by the Sultanate of Oman, and including Socotra and other islands. Power to make rules is given to the governor, and the Crown in Council reserves the right to make laws for the peace, order and good government of the protectorate,² while the colonial courts are given jurisdiction in all matters arising in the protectorate in which any person not being a native of the protectorate is concerned. Power of pardon for offences tried in the colonial courts is given to the governor absolutely, though in capital causes he must consult the executive council. All regulations made by the governor-general of India in council prior to April 1st, 1937, remain in force until altered by the governor or the King in Council.

In accordance with the assurance given in the House of Commons when the separation of Aden was discussed, safeguards are provided in certain regards. Thus provision must be made under which claims which, but for separation, might have been brought against the secretary of state for India in council may be enforced against the government of the colony as such. It is also provided that no subject of His Majesty shall, on grounds only of religion, place of birth, descent, colour or any of them, be ineligible for office under the Crown in the colony, or be prohibited from entering the colony, or from

¹ This survival of the old regime is a marked diminution of the authority of the Court. It appears to apply to cases affecting the protectorate; see s. 9 of the Protectorate Order, 1937.

² This is a very striking direct assertion of legislative power in a protectorate, hitherto of a distinctly loose character. Cf. Colonial Report No. 123, July 19th, 1936.

acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in the colony.

The separation has the obvious advantage of freeing the government of India from the complication induced by the fact that Aden is a port of great immediate importance to the British government with reference to the control of the Red Sea, and that policy regarding it and its protectorate had essentially to be determined by Britain.

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